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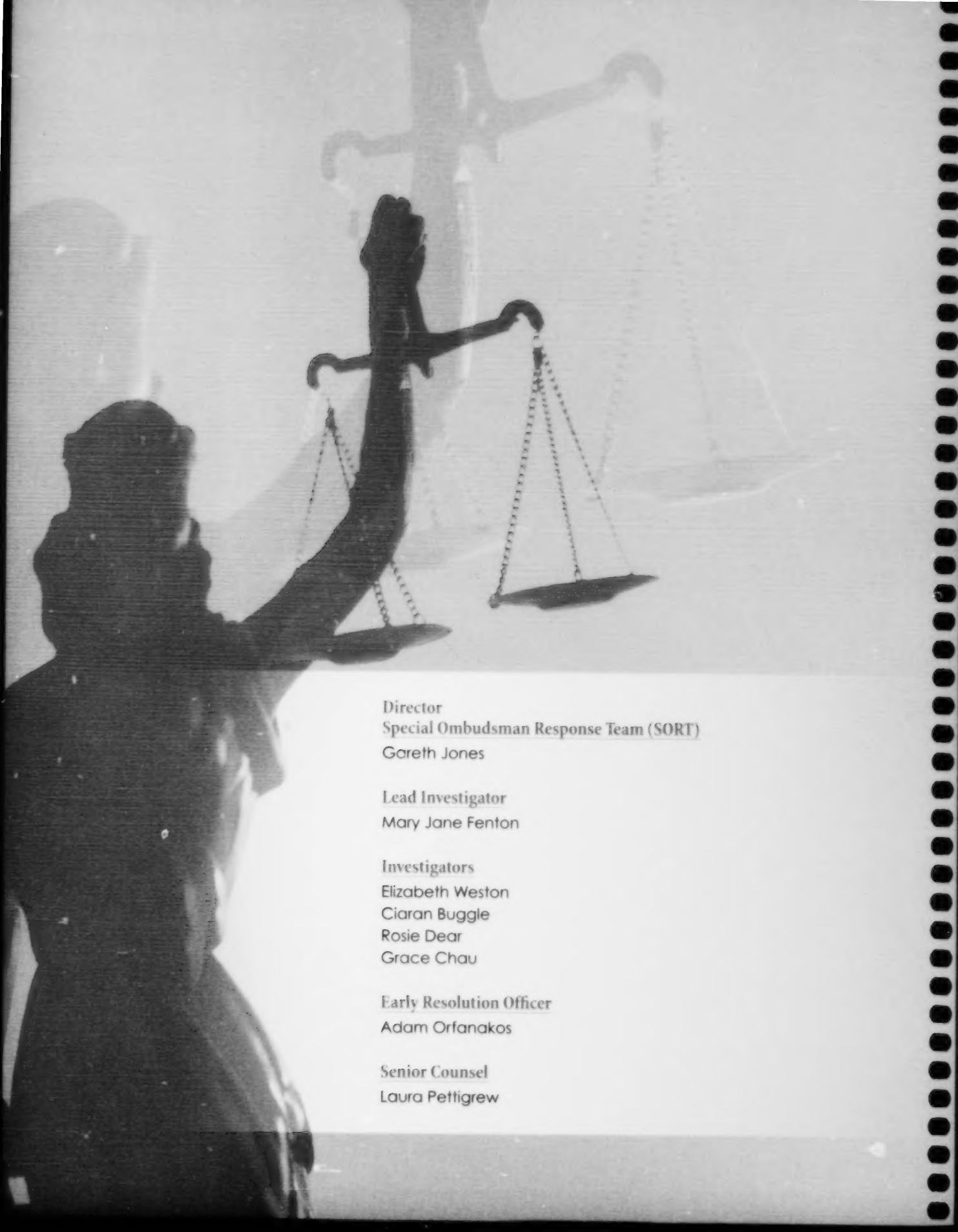
ONTARIO'S WATCHDOG

A TEST OF WILLS

Investigation into Legal Aid Ontario's Role in the Funding of the Criminal Defence of Richard Wills

OMBUDSMAN REPORT . André Marin, Ombudsman of Ontario . February 2008



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Ombudsman Report

"A Test of Wills"

Investigation into Legal Aid Ontario's Role in the Funding of the Criminal Defence of Richard Wills

André Marin
Ombudsman of Ontario
February 2008

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Executive Summary

1 This is a story about waste. Waste showed itself early in this sad saga with the senseless murder of Linda Mariani at the hands of Richard Wills, her longtime lover. He killed her, put her body in a 60-gallon garbage bin and left her remains secreted behind a false wall in his basement for nearly four months. A waste of life made worse by the wasted hope he left her loved ones as they wondered what had become of her.

2 Waste showed itself in another form in the Wills case – the staggering public costs incurred in funding Mr. Wills' defence after he was charged.

3 It is not unfair to say that Richard Wills' defence was preposterous. Indeed, it was preposterous in many ways.

4 It was preposterous on its face. Mr. Wills asked jurors to believe that Ms. Mariani died in an accidental fall and that he hid her body as a parting favour in order to save her from the indignity of being buried in her husband's family's mausoleum. He said he was just trying to fulfill her true wish to be buried near his Wasaga Beach cottage. This defence was made all the more absurd by the discovery of the murder weapon – the bat he had bludgeoned her with – entombed with her body, and a skipping rope around her neck. But in our system, everyone is entitled to advance a defence, and Mr. Wills had the right to his day in court. In fact, Richard Wills had many days in court – 293 of them to be exact; 65 days of preliminary hearing, 144 days of pretrial matters and an 84-day trial.

5 Yet this investigation is not about the integrity of Mr. Wills' defence – which the jury rejected – nor the preposterous amount of court time this case took. The preposterous feature of the defence that I am concerned with is its obscene cost. Legal Aid Ontario had estimated that Mr. Wills' defence would cost $50,000. When it was done, it in fact cost more than a million dollars.

6 How did this happen? How did expenses mount 20-fold beyond what a publicly funded trial of this kind would ordinarily cost? Simply put, it was a case of the right hand not knowing what the left hand was doing. The right hand of Justice (the hand holding the sword, as represented by judges, prosecutors and the Attorney General of Ontario) did not know that the left hand (the one holding the scales, in this case Legal Aid Ontario) was disregarding its responsibility to vet and review the legal accounts of Mr. Wills' state-funded lawyers. Legal Aid Ontario chose to approve bills as long as the math was correct, without budget or limit, no matter how extravagant the costs or how needless the work. Worse still,

it led judges, prosecutors and the Ministry of the Attorney General to believe that things were in hand when they were not. Legal Aid Ontario effectively provided Mr. Wills with a "no check/blank cheque" defence.

7 At the time of Ms. Mariani's disappearance, Mr. Wills was a man of means. He owned or co-owned five properties, had retirement savings in excess of $70,000, and had two cars that were paid for. And he had a well-paying job as a nearly 25-year officer with the Toronto Police Service. Mr. Wills was far more able than most to afford to hire a lawyer and defend himself. However, his fortunes began to change, because he made them change. Over the next 15 months he would ultimately transfer all of his assets and his entire income stream to his family before throwing himself on the benevolence of the public purse to pay for his defence.

8 His divestment of assets began innocently enough. A few weeks after Ms. Mariani's disappearance, Mr. Wills executed a separation agreement with his estranged wife. Its terms were unremarkable. In it he agreed to an equalization payment and monthly support payments that fell within the norm for persons with his means.

9 Then on June 4, 2002, the eve of his arrest, things got very troubling. He drew down on his line of credit and transferred $120,000, including borrowed money, to his wife. Two days later, he transferred an interest to her in a property which she had previously surrendered.

10 And then he hired high-profile and high-priced lawyers, Timothy and Peter Danson, and walked into the police station to try to buffalo the police about what happened to Ms. Mariani. The police did not bite. They charged him with second-degree murder.

11 Over the next six months, Richard Wills paid the lawyers $30,000. Then, after the charge was upgraded to first-degree murder, he unceremoniously fired them, veritably throwing away all he had spent to get them prepared for his defence.

12 The Dansons were only the first two casualties in a long line of legal retainers that littered Richard Wills' path to his ultimate conviction. After breaking with the Dansons, Richard Wills called on the high-priced, high-profile offices of Eddie Greenspan, hiring Mr. Greenspan's senior associate, Todd White. Remarkably, that relationship lasted until late summer 2003.

13 We do not know why Mr. Wills left Mr. White. What we do know is that by the time he did, he had transferred almost all of his wealth to his estranged wife.

Now a man of limited means with large support obligations, and unable to fund a lawyer on his own, Mr. Wills applied for legal aid. Shortly after, he fired Mr. White, who had by that point worked off $40,000 of Mr. Wills' $50,000 retainer. When the remaining $10,000 was returned to him, he gave that to his estranged wife, too.

14 Not surprisingly, the officials at Legal Aid Ontario were unimpressed by Mr. Wills' application for funding. He had given away his property and now he said, "Fund me because I have nothing." They told him they were prepared to give him the normal amount that a person of limited means would spend in his position, but he would have to pay it back at $500 a month. He refused, and asked the court to appoint a lawyer for him. The court would not assist him in obtaining free counsel, so Mr. Wills decided he would go to his preliminary inquiry unrepresented and defend himself.

15 It proved to be the preliminary inquiry from hell, even though a judge took the exceptional step of hiring an *amicus curiae* – literally "friend of the court" – a lawyer whose job was not to represent Mr. Wills but to assist the court by ensuring that his rights were respected. There was irony in this: Legal Aid Ontario had refused to pay for a lawyer at $92.34 an hour, but now the "friend of the court" was being paid $200 an hour by Court Services. One pocket was raided so that the other could be protected.

16 Throughout his legal proceedings, Mr. Wills was obstreperous. While he was not legally insane and was fit to stand trial, his behaviour was miles from the norm. He was rude and childish. He would lie down on the bench in the prisoner's dock, belch, and break wind to annoy the Judge. On one occasion he smeared his hand with excrement, and he would urinate in the police cars that ferried him to and from court. He was insolent with witnesses, lawyers and judges and impervious to judicial warnings and rebukes. Ultimately, the trial judge had to have a separate room set up outside of the courtroom where he could watch his trial by videoconference.

17 When he was playing lawyer, Mr. Wills' questioning of witnesses was interminable and invariably off the mark. His arguments and questions were rambling and incoherent. His mission seemed to be more about delaying and frustrating the proceedings than defending himself. Things languished so badly at the preliminary inquiry that it never did finish. Invoking a rarely used power, the Attorney General forced him to go directly to trial after 65 days of what the judge would call a "colossal waste" of court time and valuable justice resources.

18 It was evident after the preliminary inquiry that Richard Wills could not represent

himself before a jury, so Justice J. Bryan Shaughnessy directed him to reapply for Legal Aid.

19 But Legal Aid Ontario could not get over the fact that he had given away his means to pay for his own defence. He would have to agree to repay at a monthly rate. By this time, however, Mr. Wills, now resigned from the police force, had also assigned away his entire pension to his estranged wife. He had nothing to repay with, he said.

20 Justice Shaugnessy was left to ask an *amicus curiae* to apply on Mr. Wills' behalf for a Rowbotham order – an order made by a court requiring the Crown (that is, the Attorney General) to fund the lawyer for the person it is prosecuting. Justice Shaughnessy then granted the order. The two-part Rowbotham test had been met: First, Mr. Wills had shown that he could not receive a fair trial if left to perform in front of a jury, and second, he did not have the means to pay for his own lawyer.

21 Now, however, even with an order that the Attorney General would pay his legal fees, Mr. Wills could not find a lawyer who would agree to represent him – thanks to the combination of his personality and Legal Aid Ontario's paltry hourly tariff, barely one-third of what a mid-range lawyer can normally charge. After some delay, he was fortunate enough to find a respected senior lawyer, Cynthia Wasser, who was prepared to act for him, but not at $92.34 per hour. At that rate she would not only be compromising her own income, she would hardly break even, given the costs of running a practice. The judge took the highly exceptional step of making a Fisher order – a direction to the Attorney General to pay legal fees for the accused in excess of the Legal Aid rates; in this case, $200 per hour. Ms. Wasser was given authority to begin looking at the file on the understanding that a budget for her retainer would be established.

22 Within a few months, Richard Wills fired Ms. Wasser and her co-counsel. It was not an issue of competence. The problem was that Ms. Wasser wouldn't agree to follow Mr. Wills' directions. He told the judge that he fired her because he did not want to be "muzzled" and have his defence "hijacked." In the words of a subsequent lawyer who represented him, "[Mr. Wills] wanted to get [his] lawyer to be a mouthpiece." Any lawyer who refused to do what Mr. Wills wanted, however inane, would be discarded. The Wasser team was gone before preliminary trial motions even began, but not before undertaking $77,375.00 of wasted legal work at public expense.

23 Mr. Wills looked for a new lawyer, and ultimately, after the Ministry of the Attorney General drafted three versions of a letter promising to apply Ms.

Wasser's Fisher order to new counsel, Munyonzwe Hamalengwa agreed to become his lawyer of record.

24 When Mr. Hamalengwa sent his first bill to the Ministry of the Attorney General for payment, he itemized his work. This made the Ministry uncomfortable. The Attorney General was prosecuting Mr. Hamalengwa's client, and by rights should not be privy to the details of the work that was being done on his file. Mr. Hamalengwa was directed to send the Ministry only his bottom-line bills, and to send Legal Aid Ontario the details of what he was doing to earn the money.

25 It is not uncommon for Legal Aid Ontario to oversee the Ministry's accounts for court-ordered legal services. While Legal Aid Ontario is a private corporation independent of the government, by convention it has accepted the practice of vetting legal accounts that the Attorney General has to pay. In this way, it performs a valuable role in helping to preserve solicitor-client privilege and by lending its expertise in file review.

26 Mr. Hamalengwa objected to Legal Aid Ontario vetting his accounts or putting him on a budget; in his view, the Fisher order made no provision for Legal Aid Ontario's involvement, and he wanted *carte blanche* to do as he saw fit at $200 per hour. The Ministry tried to get him to agree to have his accounts reviewed by Legal Aid Ontario but, after doing so under protest for the first account, he refused. And so he sent accounts without detail. Over five months, he had amassed $120,684.04 in bills and disbursements.

27 The Ministry, becoming increasingly alarmed, requested that the judge who had issued the Fisher order do something to settle the matter. On June 6, 2006, Justice Shaughnessy issued a ruling. He spoke of the need for public accountability of funds and ordered Mr. Wills' counsel – Mr. Hamalengwa – to meet with Legal Aid Ontario to work out a budget consistent with the practices of what it calls its "Big Case Management program." He directed him to "submit all bills of account and billing records to Legal Aid Ontario in order to have these accounts vetted and approved by staff." Mr. Hamalengwa objected, asking for clarification of what "vetting" meant. The judge said "reviewing, adding up, making sure the math is correct," and assured Mr. Hamalengwa that Legal Aid Ontario would not straightjacket the defence.

28 The director of the Big Case Management program sent Mr. Hamalengwa a letter, copied to Ministry personnel and to the judge, requiring him to complete documents used by the program to establish a budget. In another letter, he alerted Mr. Hamalengwa to the fact that if the budget was to exceed $75,000, it could require attendance before an "Exceptions Committee meeting." He later wrote

inviting Mr. Hamalengwa to a meeting to establish a budget.

29 In reply, Mr. Hamalengwa provided a partially completed form. The Big Case Management director continued to seek details so a budget could be put in place, until August 17, 2006, when Mr. Hamalengwa sent him a letter of objection supported by select excerpts from Justice Shaughnessy's ruling. The two met the next day and Mr. Hamalengwa managed to persuade the director that the judge never intended that Big Case Management practices be used and that there was to be no budget – Legal Aid Ontario's job was simply to check the math, nothing more.

30 The Big Case Management director's acceptance that Legal Aid Ontario's role was simply to do the math is stupefying. That he would make a decision on the basis of a partial transcript shown to him by a lawyer who clearly had an interest in minimizing budget restraint is staggering. That this decision undercuts the very need for independent third-party review that caused Legal Aid Ontario to be involved is alarming. Neither the Ministry nor the judge had suggested to him that his efforts to get Mr. Hamalengwa to set a budget were out of line. No matter how it is sliced or diced, this decision shows a disturbing disregard for a clearly assumed duty, and a lack of regard for public funds.

31 I am convinced that Legal Aid Ontario's decision to act as a mere rubber stamp can only be understood against the backdrop of resentment that it felt about getting involved in the first place. That resentment is writ large in its internal documents, in which staff gripe about having responsibility for vetting Ministry accounts without compensation. Simply put, Legal Aid Ontario never felt that it had a duty to do the job it had been assigned; it was involved, it believed, as a matter of courtesy, and it was a favour it was not taking seriously. There is a stark contrast between the way Legal Aid Ontario deals with its own budget, and how it dealt with Ministry funds in this case. When its own budget funds are in play, Legal Aid Ontario scrupulously protects them through rigid review practices that include the whole chain of command. Yet with these Ministry funds, no real regard was shown.

32 As unfathomable as the decision by the Big Case Management director was, one would have thought it would have been corrected by his superiors. That did not happen, although our investigation could not determine exactly who within Legal Aid Ontario was aware of it. The Big Case Management director told us he discussed it with his supervisor, the director of Lawyer Services and Payments. But she told us she did not learn about the funding fiasco until May 31, 2007. What we do know is that even if her version is the accurate one, it reflects a disturbing breakdown of supervision. Legal Aid Ontario required all budgets

approved through Big Case Management to go to the top, yet by her account, a fortune in public funding was being approved by a middle manager without any oversight or concern by higher management.

33 Despite this, one might think that surely Ministry officials would have done something when the director of Big Case Management informed them about his changed understanding of Legal Aid Ontario's role. But this did not happen either – because the Ministry did not learn about it for more than nine months. The Big Case Management director chose not to tell them, because, he says, of solicitor-client privilege.

34 I accept that this director believed that privilege prevented him from disclosing this information. However, any suggestion that solicitor-client privilege would prevent him from telling the Ministry how he was going to administer the accounts is patently absurd. Communications between clients and lawyers are privileged. The kind of work being done and legal strategies are privileged. But a lawyer's discussion of a funding order with the party who is administering that order is the farthest thing from privileged. There would have been nothing to prevent the director of Big Case Management from telling the Ministry how he proposed to do the job. And there certainly would have been nothing to prevent him from getting legal advice on what he could disclose. He chose instead to rely on his own mistaken judgment.

35 But that is not the most distressing thing. Not only did he not tell the Ministry that he had changed his plan to get Mr. Hamalengwa to set a budget, he did precisely the opposite: He wrote to the Ministry, approving Mr. Hamalengwa's account, saying:

> We have reviewed the account of details and determined that the account is proper as to both fees and disbursements, so we are recommending that you pay him as agreed.
>
> **Please note that we did meet with Mr. Hamalengwa to discuss management guidelines and budget requirements for the remainder of the case.** (emphasis added)

36 This, and every one of the other similar comments he made on the $608,901.44 worth of bills he approved over the next 10 months, constituted nothing less than an ongoing misleading record that reasonable people would rely on as an assurance that Legal Aid Ontario was doing its job. I can find no fault in the Ministry's failure to catch on to what was happening – it trusted Legal Aid Ontario to do the kind of review it had so often done in the past, not only based on

past practice but on the Big Case Management director's misleading representations.

37 At Mr. Wills' trial, Madam Justice Michelle Fuerst had been dealing with a litany of pointless motions from the defence that *amicus curiae* Andras Schreck[1] would later describe as "frivolous." This was a clue that there was no tight leash on the defence costs.

38 Then Mr. Wills fired Mr. Hamalengwa, jettisoning the preparatory work he had done, and on May 18, 2007 he offered Raj Napal as his new lead lawyer. In his first act as defence counsel, Mr. Napal advised Justice Fuerst that the defence was calling 18 expert witnesses, many of whom would testify on matters not realistically relevant to the case. The judge wondered out loud about the public funding of the defence, calling for restraint.

39 Things got worse in early June. First, Mr. Napal challenged the evidence of a fingerprint expert who was to identify Mr. Wills' prints on the garbage bin that contained Ms. Mariani's remains – even though Mr. Wills had already admitted putting her body inside. Then the judge learned that a student on the defence team had hired a childhood friend at a cost of $13,000 to prepare a slide show of crime scene photos, including many of Ms. Mariani's remains. The judge was clearly deeply troubled about the waste of public funds involved in this legally pointless exercise, and asked for explanations.[2]

40 The Ministry learned of Legal Aid Ontario's rubber-stamp approach to the case on May 31, 2007, from none other than the director of Big Case Management. That day, he wrote to Mr. Napal that Legal Aid Ontario was "merely vetting the accounts of defence counsel by reviewing the math," and he copied the letter to the Ministry. He made the same disclosure orally to Kerry Lee Thompson, Crown Counsel at the Ministry of the Attorney General, Crown Law Office – Criminal. She was the Ministry employee responsible for issuing payment on accounts approved by Legal Aid Ontario. She said the news made her feel nauseous, a sensation no doubt made worse by the Big Case Management director's disclosure to her that the fees to that point had exceeded half a million dollars.

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[1] When it became apparent that it was unlikely that Mr. Wills would make it through his trial without firing his lawyer and putting the entire process in peril, Justice Shaughnessy appointed Howard Borenstein to act as *amicus curiae* during the trial, even though Mr. Wills' own lawyer was now being funded. Before the trial ended, Mr. Borenstein was appointed to the bench and was replaced by Mr. Schreck.

[2] The judge was also concerned with the horrendous breach of dignity and the breach of legal limits on publicizing criminal investigative materials furnished by way of disclosure that had occurred.

41 Once it learned the horrid truth, the Ministry acted swiftly. Intent on stemming the flow, it went back to Justice Shaughnessy, who said he was "shocked," "dismayed" and "disheartened" by what he called the "abandonment of such an important function" by Legal Aid Ontario. He said it was "shameful" that his order had not been followed. In the subsequent weeks, a budget was established and financial controls were put in place.

42 It was not until the trial ended that some details of the funding of Mr. Wills' defence were made public in the media. The coverage led to calls for a public inquiry and a formal complaint to my Office. The matter had become political and the government was being called to account. In response, the newly named Attorney General, Chris Bentley, announced Legal Aid Ontario had been developing a protocol for the review of legal accounts paid by the Ministry, and this would be accelerated.

43 When the Ministry took charge of that protocol, its efforts quickly teased out the attitude that led, in my opinion, to the Wills fiasco. Legal Aid Ontario had tried at first to resist the principle proposed by the Ministry that its statute, the *Legal Aid Services Act, 1998*, was "a comprehensive code for the assessment and payment of public funds in criminal and civil cases." Legal Aid Ontario's position was that its role was to deal solely with legal aid, not the payment of all public legal funds. It argued that it would be illegal for it to supervise Ministry accounts because of statutory limits in its mandate. This discreditable argument found no support in the statute and was contradicted by Legal Aid Ontario's own practices, and appears to have been a last-ditch attempt to slough off moral responsibility for the Wills case. In short order, Legal Aid Ontario received better advice and under its new top management leadership, has now accepted this function. It has pledged to offer assistance with, and improve accountability for, Ministry accounts.

44 Both the new protocol, now in place, and the change in attitude at the top of Legal Aid Ontario are praiseworthy. The Ministry and the new management at Legal Aid Ontario are to be commended. But more is required to fix the Wills fiasco.

45 First, it is necessary – both to restore public confidence and to ensure that Legal Aid Ontario's efforts at improvement are acted on effectively – that someone monitor developments within Legal Aid Ontario on the public's behalf. I am therefore recommending that Legal Aid Ontario's initiatives for internal change (**Recommendation** 1) and the results of its Wills review (**Recommendation 2**) be shared with my Office so that if they are not satisfactory, I can make recommendations and if necessary, report again to the taxpayers of this province.

46 Second, I am recommending that defence legal accounts paid with public dollars in the Wills case be examined by an Assessment Officer of the Superior Court of Justice of Ontario or other judicial officer, to ensure that the expenditures were appropriate and reasonable (**Recommendation 3**).

47 Third, and most importantly, the *Legal Aid Services Act, 1998* should be amended to impose a clear legal duty on Legal Aid Ontario to function as a one-stop clearing house for legal accounts payable by the province under court order **(Recommendation 6)**. This is efficient and will permit administrative guidance to be built in. Moreover, lawyers and judges are not bound by the agreement between Legal Aid Ontario and the Ministry; only legislation can impose a clear plan for administration on everyone so that it becomes part of every court order for legal fees. And given what happened in the Wills case, that administrative scheme should include a requirement for court approval before accused persons who are legally funded can change counsel. I am recommending that the Government report back to me on its position on this recommendation (**Recommendation 8**).

48 Fourth, as the Wills saga shows, the current practice of refusing funding because the accused has given away his or her wealth can potentially lead to the perverse result of even more public funds being spent through court-ordered funding than if Legal Aid Ontario approval was given in the first place. The solution is for Legal Aid Ontario to fund the defence when it is required, and recoup the monies later. I am therefore recommending that statutory mechanisms be developed for discouraging legal aid applicants from transferring away their wealth, and for recovering funds where this has happened (**Recommendation 7**).

49 As for Mr. Wills himself, I agree with Justice Shaughnessy that in the early stages he was prepared to try to pay for his own defence, but by September 2003, before the Rowbotham order was made, it is clear he was trying to disable himself from having to pay for his defence. He hived off his assets while abusing the generosity of taxpayers. He should have to reimburse the province for the legal fees wasted in his cause. I am therefore recommending that the government take whatever steps possible to make this happen (**Recommendation 4**).

50 I am also recommending that the Ministry report back to me on Recommendations 3 and 4 (**Recommendation 5**).

51 I understand that it is not in my purview to make specific recommendations relating to what I'll call the "elephant in the room" – the inadequate hourly legal aid rates that unquestionably impede equal access to justice in Ontario. This matter is currently being looked into by Professor Michael Trebilcock of the

University of Toronto Law Faculty. However, this investigation offers ample support for the argument that had Legal Aid Ontario offered more realistic rates at the time of the Wills case, the Fisher order that helped drive up its costs might not have been necessary.

52 In many ways, the Wills case was the result of a perfect storm of mischief, misjudgment, and perhaps even madness. It is not, however, beyond repetition if things are not fixed.

The Investigative Process

53 From the outset, the media were interested in the Wills case, due to the personalities involved and the grisly and unusual circumstances of the crime. But after his conviction October 31, 2007, details of the public funds expended on his defence were all over the news. Suddenly the focus shifted from the horrendous crime and the bizarre trial to the legal aid system. People wanted to know how unconscionable sums of public monies came to be spent defending a man who, shortly before he was arrested, bragged about being a self-made millionaire.

54 It was not long before my office was called upon to review the case. We received complaints from members of the Legislature, including the leader of the New Democratic Party. Concerns were being raised about the role of Legal Aid Ontario, the integrity of the legal aid system and, indeed, the very repute of the administration of justice in Ontario. Even judges who were involved in the case had worried out loud about the way scarce public defence funds were being used, and ultimately expressed their shock and dismay upon learning how badly things had been managed. My decision to investigate took on added impetus because of calls being made for a public inquiry. I felt it was not in the public interest to invoke such a long and expensive process to address problems that could be attended to through an Ombudsman investigation. On November 6, 2007, I issued my notice of intent to investigate Legal Aid Ontario's role in the funding of legal fees and expenditures in the Richard Wills case.

55 I assigned this case to the Special Ombudsman Response Team (SORT). A team of five investigators and one Early Resolution Officer conducted the investigation in the field, assisted by Senior Counsel. They interviewed staff at Legal Aid Ontario and at the Ministry of the Attorney General who had direct or indirect involvement in the case. They interviewed the assistant Crown attorneys who conducted the prosecution, counsel for Mr. Wills, an *amicus curiae* appointed by the court, and representatives of the Criminal Lawyers' Association. They interviewed Mr. Wills on two separate occasions at Kingston Penitentiary. They also interviewed Professor Michael Trebilcock, who was retained by the Ministry of the Attorney General in August 2007 to conduct an external review of broader issues relating to the legal aid system in Ontario, the results of which are still pending.

56 The SORT investigators reviewed thousands of documents, including approximately 3,000 pages of documentation obtained from Legal Aid Ontario, material from the Ministry and 10 bankers' boxes of documents released by the Superior Court of Justice. They spent several days at the court in Newmarket

reviewing material. They also looked at Mr. Wills' assets and conducted title searches on properties allegedly owned by him, although this was hampered by Mr. Wills' refusal to share information about his financial situation, and his decision to invoke his solicitor-client privilege to protect other material.

57 Investigators also contacted several other Canadian jurisdictions to examine how they deal with cases where the courts have ordered that state-funded criminal defence counsel be provided outside of the legal aid system.

58 We received laudable co-operation from both the Ministry and Legal Aid Ontario. John McCamus, the Chair of Legal Aid Ontario, was quick to pledge his support and let us know that the board of directors of Legal Aid Ontario was undertaking its own inquiry into the handling of the case, and he invited our involvement as well as that of Professor Trebilcock.

59 While the co-operation of Legal Aid Ontario itself was exemplary, our investigation did have to clear a hurdle erected by its external lawyer. She was understandably concerned about the obligation of Legal Aid Ontario not to disclose information that is privileged under the *Legal Aid Services Act, 1998*. She chose to try to protect privileged information by attending our interviews with Legal Aid Ontario's staff. We could not permit this, since the integrity of our investigations can only be maintained by interviewing witnesses in private, outside the potential influence of lawyers for an interested party. As a compromise, we agreed to permit Legal Aid Ontario to hire independent counsel for each staff witness, although challenged the necessity for this, given that most of those we wanted to interview were themselves lawyers. We let it be known that we did not believe it was in the public interest for Legal Aid Ontario to incur the considerable expense involved in retaining lawyers for lawyers. In the end, only the Legal Aid Ontario staff lawyers hired lawyers. The one non-lawyer we interviewed, President and Chief Executive Officer Robert Ward, came without counsel.

60 Our investigation respected the privileges imposed by the *Legal Aid Services Act, 1998*. We did not obtain Mr. Wills' application for funding from Legal Aid Ontario, nor the accounts submitted by his many lawyers. Where available, we obtained the relevant background information from court proceedings where funding issues were raised, and this has furnished us with ample information to offer in this report.

The Sad Beginning

61 The long and painful Wills saga began on February 15, 2002. That was the day that bookkeeper Linda Mariani, a 40-year-old married mother of one, went missing. The only person who knew her whereabouts at the time was Richard Wills. He knew that her remains were in a bolted 60-gallon garbage drum, secreted behind a false wall in the basement of his house.

62 Richard Wills, a father of three, was at that time an officer with nearly 25 years experience with the Toronto Police Service. He was separated from his wife Joanne. Mr. Wills and Ms. Mariani had been business partners, operating a power skating school in Newmarket with her husband. They were also longtime lovers.

63 From the outset, Richard Wills was a suspect in Ms. Mariani's disappearance. In his first encounters with the legal system he seemed co-operative, consenting to searches of his home and his vehicle. Meanwhile, he attempted to cast suspicion on Ms. Mariani's husband and feigned concern by leaving messages for Ms. Mariani.

64 At the beginning of this saga, Mr. Wills was a man of considerable means. He bragged to detectives that he was "worth over a million dollars." An affidavit filed with the court by the police in March of 2004 describes his ownership of five residential properties, including a family cottage that he co-owned with his sister. The police estimated the real estate in his name to be worth $1,163,000, with total mortgages of only $365,000. He had RRSP savings worth $72,000, and motor vehicles worth about $23,000. Yet over the next six months, he rendered himself a pauper.

65 In March 2002, within a month of Ms. Mariani's disappearance, Mr. Wills decided to formalize his separation from his wife by executing a separation agreement. Out of his annual salary of $65,000, he agreed to pay $285 per month in spousal support, and another $758 a month in child support. The agreement also provided that he owed his wife an equalization payment of $128,380, a modest enough amount that was satisfied by giving his wife his interest in a home in Richmond Hill. For his part, he received the matrimonial home, also in Richmond Hill, and accepted sole responsibility for the mortgage on another property.

66 Two months later, on June 4, 2002 – just before his surrender to police – Mr. Wills drew down the maximum on a line of credit issued by his bank. He called his wife and told her that he had transferred $120,000 into their joint bank account

and he instructed her to transfer the funds to her own account.

67 Then two days later, he agreed to transfer a joint interest in a third Richmond Hill property to his wife. His story was that he had coerced his wife into signing her interest in the property over to him, and he now wanted to make things right by restoring it.

68 The next day, Mr. Wills marched into the police station with lawyer Peter Danson, and told an incredible story. Ms. Mariani, he said, had died in his home in a tragic accident, falling backward on the stairs and striking her head on the ceramic tile. He said he had promised her that if she died he would bury her at his family cottage in Wasaga Beach, because she did not want to be buried in her husband's family's mausoleum. This, he said, was why he put her body in a garbage container behind a false wall in his basement – a stopgap measure to enable him to carry out her wishes. Before coming into the station, he had rolled the container out of its hiding place for the police to find.

69 They found it wrapped in bedspreads, blankets, clear plastic tarp, and sprayed with liquid adhesive. The lid was sealed with duct tape, bolted with a dozen large bolts and caulked. Ms. Mariani had been forced inside headfirst with a skipping rope around her neck. Also in the container were her purse and identification, her pager and cellphone (batteries removed), items of men's clothing including tags showing the clothing to have been purchased three days before Ms. Mariani's disappearance, and an aluminum baseball bat. The examining pathologist concluded that Linda Mariani died as a result of blunt force injury to her head, with possible contributory factors including neck compression and positional asphyxia.

70 Mr. Wills was charged with second-degree murder. The Danson firm acted for him from his arrest in June until the late fall. He fired them when his charge was upgraded to first-degree murder, after paying them $30,000.

71 Next, he retained Todd White of Greenspan White. Mr. White became his counsel of record on December 4 after receiving a retainer of $50,000. By September 11, 2003, he too was fired, but not before incurring costs of $40,000.

72 In the 15 months that followed, Mr. Wills transferred his interest in five properties to his wife, and his cottage interest to his sister. He cashed in his RRSPs and transferred the entire amount, approximately $70,000, to his wife. As for the $20,000 he had received in termination payments from the police force after his arrest, he appears to have transferred it away as well. As best as we can tell, that left him with a modest pension, approximately half of which would be needed to

honour his support obligations under the separation agreement.

73 In early September, Richard Wills applied for legal aid; on September 11, 2003, he received the $10,000 left from Mr. White's retainer for his legal fees. He gave that to his wife too.

74 To understand what happened next, it is important to understand Ontario's legal aid system, and other public funding practices relating to criminal defences.

Tax Dollars at Work: Public Money for Criminal Accused

75 There are two ways that accused persons can have their legal defence funded by Ontario taxpayers. The first and more familiar way is through "legal aid," a system administered by a Crown corporation, Legal Aid Ontario. Those seeking legal aid apply, and if they qualify, their lawyers' fees will be paid according to rates and terms agreeable to Legal Aid Ontario. The bulk of the money comes from the public purse; most of it provincial money, some of it federal, and a small but significant percentage contributed by lawyers out of their trust fund interest and Law Society membership fees, through the Law Foundation of Ontario.

76 The second way is less common, but is central to the Wills case. Judges have the authority under Canada's *Charter of Rights and Freedoms* to order the Attorney General of Ontario to pay for a lawyer to defend someone who does not qualify for legal aid. This is only done when accused persons cannot afford to pay for their defence on their own and when legal representation is needed to ensure a fair trial. This kind of order, named after the first person to receive such funding, is called a Rowbotham order.

77 Ordinarily, Rowbotham orders involve payment at the same hourly rate that Legal Aid Ontario pays. In highly exceptional cases a judge will supplement the Rowbotham order with a Fisher order, compelling the Attorney General of Ontario to pay the defence lawyer more per hour than Legal Aid Ontario rates.

78 The obscene amount of public funding expended on Richard Wills' defence did not come from the Legal Aid Ontario plan. Mr. Wills never qualified for legal aid. His legal fees were paid as the result of Rowbotham and Fisher orders – in hourly amounts more than double what would have been paid had Legal Aid Ontario supplied the money, and adding up to a total that Legal Aid Ontario never

would have tolerated from its own budget.

Tight-fisted Fairness: Legal Aid and its Hurdles

79 Criminal litigation is complex. Those who attempt to defend themselves without the benefit of legal counsel are at a manifest disadvantage. But legal representation is expensive, beyond the reach of many. The net effect is that those accused who cannot afford lawyers do not have equal access to justice. This is impossible to reconcile with our system's promise of equality before the law and everyone's right to a fair trial.

80 It is contrary to the public interest[3] to make those who cannot afford counsel stand trial alone. Those who are inadequately defended are vulnerable to wrongful conviction, and their trials are invariably more prone to legal error.

81 Moreover, when an accused is unrepresented, the proceedings are always difficult for the judge. Lay accused persons tend to be unfamiliar with rules of procedure, and they often fail to fully understand the legal issues they are litigating. It falls to the judge to remain impartial, while guiding the unrepresented accused through the process. The trials of unrepresented accused frequently skirt irrelevant evidence, feature arguments that are off the mark and can add to the costs and stress of litigation.

82 In the past, courts would appoint counsel for indigent accused persons in cases where self-representation could cause an unfair trial. The lawyers would act for free[4] out of respect for the court, and as a matter of charity.[5] This is no longer feasible. There are now too many such cases. Criminal proceedings have become more complicated and trials more lengthy, while the costs associated with legal

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[3] see *R.* v. *Campbell*, [1999] O.J. No. 392 at para. 24 (Ont. Ct. (Gen. Div.)

[4] see *R. v. Rowbotham*, (1988), 41 C.C.C. (3d) 1at 69 (Ont. C.A.) [hereinafter *Rowbotham*]. See also *R. v. Stiopu* (1983), 8 C.R.R. 216 at page 233 (Alta Q.B.), aff'd 8 C.R.R. 217 (Alta. C.A.); *Deutsch v. Law Society of Upper Canada Legal Aid Fund, Lawson and Legge* (1985), 48 C.R. (3d) 166 at 171 (Ont. Div. Ct.) [hereinafter *Deutsch*]; *Re Ewing and Kearney and The Queen* (1974), 18 C.C.C. (2d) 356 at 360 (B.C.C.A.).

[5] For a fuller history of the Development of Legal Aid in Ontario see Ontario, Report of the Ontario Legal Aid Review: A blueprint for publicly funded legal services (Toronto: Publications Ontario, 1997) (Chair: J.D. McCamus), online: Ministry of the Attorney General http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/olar/toc.asp (date accessed: 21 December 2007) [hereinafter *McCamus Review*] The *McCamus Review* commenced in 1996 and was released September 1997.

practice have increased. As a result, for the last 40 years, the Government of Ontario has been in the business of funding criminal defences for some accused.

83 Until the mid-1990s, the provision of legal aid was a growth industry, a testament to a generous society. Since the *Charter*, trials have become more complex and expensive, while demographic and economic changes have left an increasing number of Ontario residents without the means to fund their own defences. Funding pressures soon threatened the system with collapse. Restraint and fiscal control have since become constant preoccupations of legal aid policy. There have been funding caps imposed on legal counsel, strict limits on eligible offences, and dramatic cutbacks. A low point came in 1996-1997, when there were only 75,000 certificates issued to lawyers for legal aid funding, a reduction of more than 150,000 from just a few years earlier.

84 Under the financial pressure and in response to objections from the profession, in 1997 the government of the day commissioned a review led by Professor John McCamus (now the current chair of the Ontario Legal Aid Plan). His report, entitled *A Blueprint for Publicly Funded Legal Services*, recommended the creation of an independent body to govern the plan and a governance structure that would ensure accountability to the public:

> The legal aid system must also be accountable to the government of Ontario and to the general public for its handling of public funds.... The governance structure must be able to reassure the public that the money is being wisely spent. The governors of legal aid must be able and willing to provide the kinds of reports and information that will permit the government and other interested parties to reach informed conclusions about the manner in which public resources have been expended upon legal aid.[6]

85 The following year, the government introduced the *Legal Aid Services Act, 1998*, which created Legal Aid Ontario as an independent corporation accountable to the government through the Attorney General. Legal Aid Ontario is governed and managed by a board of directors appointed by the Lieutenant Governor in Council. Its mandate includes the provision of legal services to low-income individuals "within a framework of accountability to the Government of Ontario for the expenditure of public funds." And those funds are considerable. In 2005-2006, Legal Aid Ontario had an operating budget of $309,321,000, paid for primarily with provincial monies. It processed 131,157 applications, approving funding in 111,018 cases.

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[6] *Ibid* at page 21.

86 Notwithstanding the high approval rates reflected in those statistics, it is decidedly *not* easy to qualify for legal aid. Stringent financial and legal eligibility requirements are imposed. Eligibility levels were reduced by 22% in 1996[7] and have not been increased since. A family of four with a net income of $29,000 might not qualify for legal aid. The result is the failure to fund many meritorious cases, an outcome that is not the fault of Legal Aid Ontario but of the failure by successive governments to put new money into the system.

87 The application process, overseen by the program's 51 regional area directors, is demanding. Those who apply must disclose their income, assets and dependents and Legal Aid Ontario investigates each applicant's eligibility. Applications are judged against a budget of prescribed maximum allowable amounts for personal living expenses, and anything that applicants possess or earn above those amounts is considered to be money that can be used to pay for a lawyer. Legal Aid Ontario can require applicants to agree to contribute to the costs of their legal services. It can register liens against property to secure repayment and has special statutory powers for recouping money it is owed. To further ensure the integrity of applications, lawyers and service providers are legally obliged to report misrepresentations or non-disclosure by applicants.

88 Legal Aid Ontario also has detailed policies requiring that its staff be diligent in identifying and considering cases where applicants or their spouses have transferred assets in the 12-month period prior to application. Unusual circumstances are to be reported to the area director.

89 When legal aid is approved, regulations under the Act establish a number of limits with respect to allowable fees and disbursements (see O.Reg. 107/99). Those regulations contain fee schedules setting out specific fee caps for services, and even when working within those caps, regulations prohibit lawyers from charging for more than 10 hours per day, even though it is common for lawyers engaged in a trial to work longer. It is a frequent complaint of lawyers that the overall hourly tariffs are inadequate. While the days of voluntary charitable legal service are technically over, the reality is that the 4,000 private lawyers who provide legal aid routinely spend additional unpaid hours on the cases they take.

90 For those hours that are paid, the tariffs purport to reflect "fees customarily paid by a client of modest means." Those tariffs have, however, fallen seriously

[7] Online: Legal Aid Ontario < http://www.legalaid.on.ca/en/news/Financial_Eligbility.asp> (date accessed: 21 December 2007).

behind. According to Legal Aid Ontario[8], a client of "modest means" would be expected to pay legal fees of between $200 and $300 per hour. However, the highest rate that Legal Aid Ontario pays to lawyers is currently $96.95 an hour for a Tier 3 counsel with 10 or more years of service. This amount represents a 5% increase as of July 18, 2007. Prior to that, the rate had only increased by 10% since 1987.

91 Legal Aid Ontario does have the discretion, exercised by its staff of 50 in the Lawyer Service and Payments area, to increase its caps on an exceptional basis, taking into account myriad factors relating to the complexity of a case. Such increases are awarded only after the work has already been performed and are not routine. By the same token, Legal Aid Ontario can disallow fees where proceedings have been unduly prolonged, fees have been incurred through negligence, or the fees are otherwise unreasonably incurred.

92 Regulations under the *Legal Aid Services Act, 1998* require lawyers to keep detailed accounts of services rendered. They are subject to random examination and Legal Aid Ontario gives special vetting to billings where there have been complaints, a pattern or high incidence of error, or where billing amounts appear high or out of line with those of other lawyers handling similar cases.

93 Those cases whose costs are expected to exceed $20,000 fall into the "Big Case Management program"[9], initiated in 1995 as a "cost management and containment system."

94 "Big Case" budgets are estimated based on the length and complexity of the proceedings. They must list the steps in the proceeding that a reasonable applicant of modest means would authorize under a private retainer if advised of the available options, the potential results, and the costs involved. The budget must also specify the anticipated total fees and disbursements for those steps.[10]

95 The Big Case Management regimen is demanding. It begins with the lawyer submitting a three-page Hearings Opinion Guideline disclosing the kind of case and describing the work expected, including unusual motions. Then the lawyer meets with one of 12 area directors who have expertise in criminal law to establish a reasonable preliminary budget.

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[8] Online: Legal Aid Ontario < http://www.legalaid.on.ca/en/news/Lawyers_Fees.asp > (date accessed: 21 December 2007).

[9] In 1999, some general provisions relating to the Big Case Management program were set out in O. Reg. 107/99.

[10] O. Reg. 107/99, s.5(6).

96 In cases where a superior court trial will be conducted, the lawyer must submit a nine-page Trial Opinion Guideline after the preliminary hearing and the first superior court pretrial. This must set out the theory of the defence, the volume and nature of the material disclosed by the prosecution, the preparation required, evidentiary matters that are apt to arise, and other procedural information including motions to be argued.

97 Then a second budget meeting is held, the area director reviews the plan, and it is not uncommon for funding for particular motions or trial strategies to be denied. The budget will reflect Legal Aid Ontario's basic tariff provisions, including the ordinary hourly rate and the maximum billing per service-provider, per calendar day, or per year.

98 The president of Legal Aid Ontario is informed of the outcome of all Big Case budget meetings,[11] and the decisions of the area director can be appealed to the president.[12] It is clear that there is careful oversight.

99 Since 2001, cases whose budgets are expected to exceed $75,000 undergo an even more rigorous evaluation. They are referred to the Big Case Management Exceptions Committee, composed of Legal Aid Ontario officials and prominent and highly respected members of the criminal bar who have demonstrated expertise in conducting large cases, who provide their services *pro bono* – for free. The committee essentially conducts a peer review of proposed budgets to ensure that they are subject to objective and expert scrutiny. It assesses the necessity and viability of proposed defence motions, and those expected to be unproductive are not approved. The probability of success of the proposed defence will also influence the committee's review of the budget.

100 The costs associated with Big Case Management have risen dramatically in recent years, in part because of the recent phenomena of "megacases" and "guns and gangs" prosecutions. These cases, aimed primarily at organized criminal activity, typically involve numerous accused and complex and lengthy police investigations. On November 20, 2006, Legal Aid Ontario announced its funding guidelines were changing because its Big Case Management program had grown 400% in six years. In 2006-2007, it had 49 new cases with budgets exceeding $75,000, at an average completion cost of $77,816 per accused. Megacases had an average completion cost of $151,486 per accused. More than $23 million was spent that year on big cases.

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[11] *Ibid*, s.5(7).
[12] *Ibid*, s.5(8).

101 In the 2007 provincial budget, the Government announced an additional $51 million investment in Legal Aid Ontario over three years. Of that, $15 million was earmarked for the Big Case Management program.

102 Given the pressures on Legal Aid Ontario, not everyone who requires legal assistance will qualify. Many are left to represent themselves. Where it is impossible, however, for an accused of marginal means to get a fair trial if unrepresented, courts sometimes step in and order funding outside of the statutory legal aid scheme. This happened in the Wills case.

The Price of Fair Trials: Court-ordered Funding

103 With the advent of the *Charter*, courts claimed new authority to impose the costs of criminal defences on the public. The groundbreaking case was *R. v. Rowbotham*.[13] It involved serious drug offences and a complex and difficult trial. One of the accused, who had been denied legal aid, argued on appeal that the *Charter* guarantees public funding to those who cannot afford a lawyer. In its decision, the Ontario Court of Appeal accepted a much more modest proposition. Citing an earlier Divisional Court decision, it agreed that:

> There may be rare cases where legal aid is denied to an accused person facing trial, but, where the trial judge is satisfied that, because of the seriousness and complexity of the case, the accused cannot receive a fair trial without counsel, in such a case it seems to follow that there is an entrenched right to funded counsel under the *Charter*.[14]

104 A judge making a "Rowbotham" order does not order the payment of fees directly. Where this constitutional right is established, the judge will stay the proceedings until necessary funding of counsel is provided, thereby putting the Attorney General in the position of either abandoning the case or providing the money. The *Rowbotham* case has come to be used by courts across Canada to justify directing that proceedings be halted pending retention of state-funded counsel by an accused not otherwise eligible for legal aid assistance.[15]

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[13] *Rowbotham*, *supra* note 4.

[14] *Deutsch*, *supra* note 4 at 173-4.

[15] The case has been followed in at least 32 instances in virtually every province and territory, see for instance: *Quebec (Procureur general) c. Marchand*, [2007] J.Q. no. 12159, online: QL; *R. v. Caron*, [2007] A.J. No. 449 (Alta. Q.B.), online: QL; *R. v. Fouriner*, [2006] O.J. No. 2434 (Ont. C.A.), online: QL; *R. c. Doiron*, [2004] N.B.J. No. 344 (N.B.C.A.), online: QL; *R. v. Grant*, [2003] B.C.J. No. 1866 (B.C.S.C.), online: QL; *R. v. Innocente*, [2002] N.S.J. No. 225 (N.S.S.C.), online: Q.L.; *R. v. Rooney*,

105 Then there is the case of *R. v. Fisher*.[16] Larry Fisher qualified for legal aid assistance in Saskatchewan, but the Legal Aid Commission would not agree to his request to use a lawyer from outside the province at a rate higher than the legal aid rate of $66 an hour. The case raised complex evidentiary issues because Mr. Fisher was being prosecuted for the same murder that David Milgaard had been wrongly and infamously convicted of nearly a generation earlier. Mr. Fisher had testified at the Supreme Court of Canada reference into the Milgaard conviction. It was sensible to permit him to use the same lawyer he had at that hearing, but that lawyer would not accept legal aid rates. The court ultimately ruled that it had the authority to order that specific counsel be appointed, including at rates that exceed legal aid tariffs, where necessary to ensure a fair trial. The judge set the lead counsel's rate of pay at $150 an hour and a co-counsel's at $75 an hour,[17] placing no limit on their hours, except to say that once the total hourly fees exceeded $50,000, a review of the order could be made to the court.

106 The *Fisher* decision emphasized the unique circumstances of the case, but the case has nevertheless been followed by a number of courts to extend the right of counsel of choice to an applicant and to establish a fee tariff beyond legal aid rates.[18] In *Regina et al. v. Peterman*[19], the Ontario Court of Appeal ruled that while there was no general positive obligation on the state to provide funding for a counsel of choice, there are two exceptions where this may happen – first, in unique cases where the accused establishes that he can only obtain a fair trial if represented by a particular counsel, and second, where the accused cannot find competent counsel on conditions imposed by Legal Aid Ontario. The appeal judges cautioned: "One would expect these cases to be exceedingly rare." They went on to consider the propriety of courts making orders directly against Legal

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[1994] P.E.I.J. No. 121 (P.E.I.S.C. (T.D.)), online: QL; *R. v. Waren*, [1994] N.W.T.J. No. 93 (N.W.T.S.C.), online: Q.L., *R. c. Rodrigue*, [1994] Y.J. No. 113 (Y.K.S.C.), online: QL; *Spellacy v. Newfoundland*, [1991] N.J. No. 228 (Nfld. S.C. (T.D.)), online: QL; *R. v. Hotomanie* [1988] S.J. No. 241 (Sask. C.A.), online: QL.

[16] [1997] S.J. No. 530, (Sask. Q.B.), online: QL [hereinafter *Fisher*].

[17] In doing so the Court indicated that it was following the decision of R. *v. Curragh Inc.*, (1997), 113 C.C.C. (3d) 481 (S.C.C.), which determined that in circumstances in which much of the accused legal costs were incurred as a result of words and conduct of the trial judge that gave rise to a reasonable apprehension of bias, the accused's reasonable legal costs for the prior proceedings and incurred in the new trial should be paid by the state.

[18] G.G. Mitchell, "The Right to State-Funded counsel in the Criminal Context: Emerging Issues on an evolving entitlement – A Discussion Paper", online: Uniform Law Conference of Canada <http://www.ulcc.ca/en/poam2/Right_to_State_Funded_Counsel_En.pdf> (date accessed: 21 December 2007) at 19, referring to *R. v. Fok*, [2000] A.J. No. 1182 (Alberta Q.B.); *R. v. Rooney*, [1994] P.E.I.J. No. 121 (S.C. (T.D.)), and *R. v. Gero*, [2002] O.J. No. 3409 (Ont. Sup. Ct.).

[19] (2004) 185 C.C.C. (3d) 352 (Ont. C.A.).

Aid Ontario in criminal cases, and found that such orders should be made against the Crown and not Legal Aid Ontario.

107 In keeping with the caution expressed in each decision, Ontario courts do exercise considerable restraint in granting "Rowbotham" and "Fisher" remedies, and the orders remain relatively rare. Kerry Lee Thompson, Crown Counsel at the Ministry of the Attorney General, Crown Law Office – Criminal, who is responsible for processing payments under Rowbotham and Fisher orders, advised us that she receives only a few such orders a year. In 2006, the Ministry processed $22,450.70 in accounts relating to four Rowbotham matters, and paid out $274,053.94 under two Fisher orders, one of them being the Wills order. As of September 2007, there were four Rowbotham matters being administered, with the Ministry paying out $34,690.05 to that date. The Wills order was the only Fisher case being administered in 2007.

108 One reason why Rowbotham and Fisher orders may be rare in Ontario is that Legal Aid Ontario has a policy of processing applications so as to avoid their need. Its Area Office Policy Manual criteria for exercising discretion about financial eligibility includes consideration of "the seriousness of a legal case and reasonable legal fees … matters for which Rowbotham application may be made." Similarly, when applications are made on the eve of trial, Legal Aid Ontario staff do what they can to ensure that any order of the court relating to fees is made in accordance with Ontario's legal aid tariff. These practices are not unlike those in place in British Columbia, where the Legal Services Society attempts to prevent Rowbotham and Fisher orders by automatically reconsidering applications for legal aid where an applicant is only slightly over financial eligibility limits, and has a serious and complex case that would likely result in a Rowbotham order.

Courtesy Call: Overseeing Ministry Payments

109 Even though Rowbotham and Fisher orders are rare, it is not uncommon for Ontario courts to order the Attorney General to pay the legal bills of people it is litigating against. Section 22 of the *Proceedings Against the Crown Act* requires that the Minister of Finance pay such orders out of the Consolidated Revenue Fund. The practice is for payments to be administered through the Ministry of the Attorney General. It processes more than 400 such accounts per year. Many of these are orders made by the Ontario Review Board, a mental health body. Some involve bills for lawyers who are appointed to cross-examine child complainants in sexual offence prosecutions against unrepresented accused, in order to save those complainants from being cross-examined by the person they allege to have

abused them. The Ministry also administers orders made under the *Criminal Code of Canada* for the payment of lawyers conducting criminal appeals. As well, the Ministry processes payment of lawyers retained through judicial order to assist the court – the so-called "friend of the court" or *amicus curiae*.

110 The Ministry does not keep statistical records of the payments it makes pursuant to the *Proceedings against the Crown Act*, or of the amounts paid under each order made. But efforts are made to control spending. Accounts paid for legal fees by the Ministry are generally honoured at the legal aid tariff rate unless a court expressly orders otherwise. The Ministry will not make payment on these accounts without confirming the legitimacy of the work with the relevant government lawyer. If the lawyer being paid disagrees with the amount offered, the Ministry will not compromise. Instead, it pays what it believes is owed and suggests that the lawyer attend court to have the accounts "taxed," a process in which a judicial official renders a decision on the appropriateness of the bill.

111 One of the perils in having the Attorney General processing accounts is that they frequently contain privileged information.[20] It is unseemly – indeed improper – to require lawyers to submit privileged information to the Attorney General's office in ongoing cases where their courtroom opponent is a Crown prosecutor from that same office. In an effort to avoid this, the Ministry of the Attorney General occasionally refers accounts to officials at Legal Aid Ontario to process.

112 This is not the only time the Ministry of the Attorney General calls on Legal Aid Ontario to assist in administering accounts. Accounts are also referred to Legal Aid Ontario in cases where the Ministry can profit from its expertise in reviewing the billings of lawyers, for example, where lawyers have billed for hours in excess of the legal aid tariff.

113 When the Ministry receives accounts under Rowbotham or Fisher orders, it will ask on a case-by-case basis for Legal Aid Ontario to help manage them. The practice is developed and sensible enough that Ms. Thompson advised us that she does not always receive early notice of an application for a Rowbotham or Fisher. She indicated that these applications are often handled by the local Crown Attorney's office in conjunction with a Legal Aid Ontario area office. Legal Aid Ontario reports administering six Rowbotham/Fisher cases since 2002.

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[20] See, for example, *Maranda v. Richer*, [2003] S.C.J. No. 69. The Supreme Court of Canada considered that the amount of fees paid to a solicitor is generally protected by solicitor-client privilege. The Court recognized a presumption that such information falls prima facie within the privileged category.

114 The Ministry relies heavily on Legal Aid Ontario's evaluations. Ms. Thompson told us she will not pay an account until she has received confirmation from Legal Aid Ontario that it either fits into the proposed budget or has been approved by the Exceptions Committee.

115 The authority of Legal Aid Ontario to participate in this way appears to find support in the statutory objects set out in the *Legal Aid Services Act, 1998*, which include the co-ordination of services with other aspects of the justice system. Section 58 of the statute confers the express authority on Legal Aid Ontario to enter into agreements with governments, including the government of Ontario, relating to the provision of legal aid services. It has also occasionally entered into contracts with the federal government to administer court orders requiring state funding of legal representation in serious federally prosecuted cases. Those contracts provide for Legal Aid Ontario to administer those accounts to the extent possible in accordance with its own procedures and policies. Legal Aid Ontario is reimbursed under these contracts and receives a 9% administration fee.

116 Since 2003, Legal Aid Ontario has reviewed 68 accounts relating to 21 matters involving court orders directing the provincial Attorney General to fund opposing counsel. Unlike its dealings with the federal government, Legal Aid Ontario does not receive any remuneration for this service. Officials at Legal Aid Ontario tend to describe their role in the financial administration of cases on behalf of the Ministry of the Attorney General as being a "matter of courtesy." The director of Lawyer Services and Payments at Legal Aid Ontario advised our investigators that she spends about a day a week administering cases falling outside Legal Aid Ontario's direct statutory mandate. Although few of those cases are Rowbotham or Fisher orders, the processing of special cases does tend to be more burdensome than legal aid accounts as they have to be processed manually – they do not have the certificate numbers required to utilize Legal Aid Ontario's computerized case management system.

117 In spite of this, it is clear – based on the non-privileged documents we could obtain – that Legal Aid Ontario has habitually applied commendable rigour when reviewing accounts on behalf of the Ministry, including by requiring counsel to comply with relevant policies and procedures. In one complex fraud case we reviewed, accounts submitted under the Fisher order were "strictly examined" by an accounts examiner. Defence counsel was made to furnish detailed information as the case progressed, explanations were sought and received, and Legal Aid Ontario compared the bills to accounts received in similar cases. Account adjustments were made as a result of the review.

118 Similar service was provided in a 2003 case after the court ordered the Attorney General to fund counsel at the rate of $125 per hour. A budget was set based on information furnished by defence counsel and the case was managed using the policies and procedures for Big Case Management. Again, adjustments were made to the accounts because of the reviews.

119 That same year, Legal Aid Ontario gave effective administration to a complex fraud file in which it had denied funding because of concern that the accused had not made honest disclosure of his assets. The director of Big Case Management reported to the Attorney General that the matter was administered using Legal Aid Ontario's ordinary criteria and the defence strategy was reviewed. Only after clarification was obtained were the fees billed determined to be "reasonable and appropriate in accordance with Legal Aid Ontario's usual standards for payment."

120 In 2004, Legal Aid Ontario administered the accounts in a dangerous offender application where the accused had been convicted of attempted murder and intimidating a justice official. It was a difficult case in which the accused had discharged several lawyers. Legal Aid fulfilled its court-appointed task of establishing a budget and reviewing the accounts while respecting solicitor-client privilege. That same year, it administered effectively a consensual Rowbotham application, as well as the accounts of an *amicus curiae* appointed in relation to another dangerous offender application. All of these accounts were reviewed and paid according to the legal aid tariff after blocks of hours were authorized in a fashion consistent with Legal Aid Ontario's processing of discretionary increase requests.

121 Ontario is not the only jurisdiction where Rowbotham and Fisher orders may be administered by legal aid offices.[21] Exceptionally, in Saskatchewan, they are handled solely by the Courts Services Branch of the Department of Justice, which negotiates retainer terms with counsel. If this cannot be done, the parties may return to court where terms are settled. In all other jurisdictions we looked at, the task falls to the relevant legal aid provider.

122 With the exception of British Columbia, each of these legal aid providers also furnishes the service without any formal arrangement in place, similar to Ontario. In B.C., the administration of Rowbotham and Fisher orders is done under a Memorandum of Understanding between the province and the Legal Services Society.

[21] We were unable to obtain information about New Brunswick and P.E.I. by the time of reporting.

123 Quite clearly, there is an awkward intersection between legal aid and court-ordered funding where full administrative systems are not yet established. The perils of depending on *ad hoc* solutions in administering court-ordered accounts were laid bare in the Wills case.

'A Test of Wills'

124 To give context to the process that led to the staggering costs of Mr. Wills' defence, it is necessary to get a measure of the man. Mr. Wills was an obstreperous, obnoxious defendant.

125 He was manipulative. He feigned visits from spirits and tried to dupe a psychiatrist into supporting an insanity plea. He bullied his lawyers. He did what he could to delay matters, using the little bit of legal knowledge he had acquired as a police officer to claim rights he did not have. He was histrionic. On June 28, 2006, he complained to the trial judge that the police had beaten him, demanding to go to the hospital. When his request was denied, he slumped forward as if dying and closed his eyes, provoking laughter from court spectators.

126 In the restrained characterization of the judge, his conduct at the preliminary inquiry often "bordered on contempt." This was made clear in the trial transcripts and media reports we reviewed. Mr. Wills frequently spoke out during hearings. He addressed judges without any pretense of respect. He swore, and insulted witnesses, judges and prosecutors. Like an obnoxious child, he belched out loud and made even ruder noises.

127 His conduct was disruptive, even to his own lawyers. He would laugh out loud or lie down in the prisoner's box, and he was impervious to judicial rebukes. On March 1, 2005, Justice Shaughnessy, declared, surely no pun intended: "I think we have unfortunately a test of wills here." Ultimately, this obstreperous man did get his will – he wanted the public to bear the brunt of the cost of his defence, and, as an act of decency, it did.

The Preliminary Disaster

128 Around the time of Mr. Wills' arrest in 2002, he was far more able than most to fund his own defence. But by September of 2003 he claimed to be a pauper, and

so he went to Legal Aid Ontario.

129 Legal Aid Ontario estimated that, based on comparable cases and the restrictions of legal aid tariffs, Mr. Wills' defence would cost $50,000. But it discovered he had alienated assets even though he knew he would be requiring funds for his legal defence, and it came to believe that he continued to own a residence in Mississauga. After his initial application and an application for reconsideration, Legal Aid Ontario would only offer to front money to him if he agreed to pay it back – and to secure payment by putting a lien on the Mississauga property. Mr. Wills claimed that he no longer owned the property, and refused the offer.

130 Having fired two sets of lawyers by then, Mr. Wills entered into the criminal pre-trial process unrepresented. On October 7, 2003, Justice Joseph F. Kenkel attempted to impress upon him how important it was for him to have representation. Mr. Wills asked Justice Kenkel if there would be any liability on his part if the court was to assign him a lawyer. Justice Kenkel told him point-blank that the court would not do so.

131 Whether it was because of Mr. Wills' earlier conduct in court, or simply the seriousness of the case, on December 3, 2003, Justice Kenkel took the rare step of appointing Howard Borenstein as *amicus curiae,* or "friend of the court," to assist during the upcoming preliminary inquiry. Mr. Borenstein did not represent Mr. Wills directly, but he was responsible for ensuring that Mr. Wills' legal rights were protected.

132 When Mr. Wills next appeared in court on February 5, 2004 after having been sent for a psychiatric assessment, he again asked Justice Kenkel for a court-appointed lawyer. The judge refused, saying:

> You had two previous sets of lawyers who you saw fit – saw fit to discharge. Legal Aid … did offer you legal aid, but you had to sign a payment agreement. You refused to sign that payment agreement, in the circumstances as I indicated months ago, in my view the reason you're not represented is because you choose to not be represented and I will not appoint counsel in those circumstances....

133 On February 19, 2004, lawyer Dirk Derstine, acting on a *pro bono* basis, appeared before the Court and indicated that Mr. Wills wished to retain him. Mr. Derstine was also assisting Mr. Wills with his attempts to obtain legal aid. On February 26, 2004, he advised Legal Aid Ontario that Mr. Wills no longer owned the Mississauga residence and it agreed to reconsider its decision. On February 27, 2004, Legal Aid Ontario offered to issue Mr. Wills a legal aid certificate

conditional on his signing a payment agreement without lien. The agreement would require that Mr. Wills pay $1,000 immediately, and monthly payments of $500 commencing March 25, 2004. The requirement for immediate payment was later apparently waived and Mr. Wills was offered assistance if he would contribute $500 a month as of March 2004. But he professed to have no funds, making repayment impossible.

134 With the preliminary hearing scheduled to begin March 9, 2004, and without legal aid to fund the defence, Mr. Derstine brought a Rowbotham application to Superior Court on Mr. Wills' behalf, asking to have his fees paid by the Attorney General. The Crown charged that Mr. Wills had "intentionally maneuvered himself into this present circumstance where he now seeks funding of his defence without any payment provision."[22]

135 The argument evidently appealed to Justice Alan W. Bryant, who dismissed the application. Mr. Wills would represent himself at the preliminary inquiry. This would prove to be disastrous for the administration of justice. Ordinarily, preliminary inquiries are far simpler and more expeditious than trials. Mr. Wills' was anything but.

136 The primary function of a preliminary inquiry is simply to determine whether the Crown has enough evidence to justify having a full trial on the charge. When questioning Crown witnesses, however, Mr. Wills either had no sense of relevance or purpose, or he was trying to prolong the process. One police detective was cross-examined for nine days, without point. Moreover, although it is also exceedingly rare for the accused to call evidence at a preliminary inquiry, Mr. Wills advised the court that he was going to call 20 witnesses. By November 12, 2004, 65 days into the hearing, he was on witness 16.

137 Justice William A. Gorewich, the presiding justice, admonished Mr. Wills frequently for "filibustering" and "hijacking" the process. On April 21, 2004, Justice Gorewich chided him for his "*ad nauseum*" cross-examinations. On July 21, 2004, he lamented that the proceedings that day were "essentially valueless," and on October 7, 2004, he lambasted Mr. Wills for taking advantage of his status as an unrepresented accused to waste the court's time. That waste, Justice Gorewich remarked, was "colossal" and was a pattern repeated on "many, many, many days in this preliminary inquiry." Mr. Wills was undeterred.

138 After day 65, the Attorney General had little choice but to bring the preliminary inquiry to a premature close by invoking his rarely used power to indict an

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[22] *R. v. Wills*, (10 March 2004), Central East Region 02/07/31 (Ont. Sup. Ct.) (Respondent's Factum, para. 7).

accused to stand trial without a committal order from a judge. By the time pretrial hearings were being conducted in Superior Court before Justice Shaughnessy, it was obvious that Mr. Wills simply had to be represented. The judge directed him, yet again, to apply for legal aid.

The Rowbotham Order

139 In this legal aid application, Mr. Wills declared he had no assets or pension, since he had transferred it to his wife. Consistent with its policy, Legal Aid Ontario urged that Mr. Wills should have retained assets to defend himself, rather than making non-court-ordered support payments. Legal Aid Ontario maintained its position that it would front him the money for a lawyer, but only if Mr. Wills agreed to pay at least $500 a month towards his defence.

140 At some juncture unknown to us, Mr. Wills and Mr. Derstine parted ways. On January 4, 2005, Justice Shaughnessy reappointed Mr. Borenstein to assist the court, this time by bringing a second Rowbotham application for Mr. Wills. A hearing was held January 14, 17 and February 2, 2005, and on the third day, Justice Shaughnessy granted the application.

141 To many, it might appear shocking that Mr. Wills got what he was seeking, a state-funded defence, even though he had divested himself of his assets. There was, however, some urgency in ensuring that Mr. Wills' trial was fair. Justice Shaughnessy observed that Mr. Wills had amply demonstrated that "he does not have the requisite skill or knowledge to conduct his own defence." He described how Mr. Wills' "method of presentation" as well as his dogged behaviour "has the effect of alienating everyone in the courtroom" and "that alienation may extend to a jury." Mr. Wills was simply "ill-equipped to represent himself adequately, or even to … have a fair trial conducted." The only issue remaining in the Rowbotham application, then, was whether he had the financial means to represent himself, and, regardless of his means in the past, the fact was that on February 2, 2005, he did not.

142 Justice Shaughnessy noted that Legal Aid Ontario's decision to deny Mr. Wills funding was regrettable. Its reasoning and the evidence furnished by Legal Aid Ontario's director of Appeals and Freedom of Information left him unimpressed. This director claimed that Mr. Wills had divested himself of over $1 million, but the judge found this misleading. Legal Aid Ontario acknowledged there had been errors in its title searches and in the net equity it had estimated in Mr. Wills' property. As well, Legal Aid Ontario appeared to have paid no regard to the fact

that Mr. Wills had paid $70,000 towards his defence before he even applied for aid, a "significant contribution in the context of what is otherwise a middle class citizen with a separated spouse and three children to support," in the judge's view. The payment of that money contradicted Legal Aid Ontario's suggestion that he had divested his assets solely for the purpose of entitling himself to public funding. Finally, Justice Shaughnessy was "taken aback" by Legal Aid Ontario's policy that the need for payment of legal fees must be given priority to all else, "even if it meant that the applicant had to default in his support obligations." He suggested that Legal Aid Ontario had adopted a rather jaundiced and restrictive view of Mr. Wills' support obligations.

143 The bottom line, though, was that Mr. Wills could not pay. Legal Aid Ontario had imposed a repayment condition on him that was impossible for him to meet, thereby leaving the responsibility for securing funding to the court, which clearly displeased the judge.

144 In considering whether to make the Rowbotham order, Justice Shaughnessy was pragmatic: It would be cheaper than proceeding with *amicus curiae*. The "friend of the court" at the preliminary inquiry was paid $200 and hour – more than twice the legal aid rate – and had already cost $142,000, close to three times the budget that Legal Aid Ontario had predicted for the entire case. Justice Shaughnessy granted the order.

145 The lawyer who represented Legal Aid Ontario at the hearing explained to Justice Shaughnessy that it was difficult for Legal Aid Ontario to administer Rowbotham orders unless the legal aid framework is applied. He noted that there were negotiations underway with the Crown to establish a protocol for administering such orders, but that it was not yet in place. Nevertheless, the order was made without addressing the question of its administration, and the issue was left unattended.

The Fisher Order

146 In pretrial proceedings after the Rowbotham order was made, Mr. Wills complained that he could not find a lawyer at legal aid rates. He wanted a funding increase. As he put it to Justice Shaughnessy, "[T]he way you're trying to say that this deal should go together … it ain't happenin' baby, okay?"

147 On March 18, 2005, defence lawyer Ken Murray attended before Justice Shaughnessy and indicated that he was speaking with Mr. Wills, but needed some

time. He then fell by the wayside.

148 On April 5, 2005, another defence counsel, Cynthia Wasser, requested an adjournment until April 21, 2005, so that she could explore a retainer. She told the judge and Crown she was prepared to accept a retainer at $200 an hour, as opposed to her regular hourly rate of $375. She also requested co-counsel at the same rate, disbursements, payment for travel and an initial allotment of 200 hours for reviewing the files, meeting with co-counsel and Mr. Wills. She suggested that once her initial review was complete, she would be in a position to estimate the hours necessary for preparation and attendance at trial. She also noted that a student-at-law might be necessary to assist with research.

149 No agreement was reached between the Crown and Ms. Wasser, and on April 21, 2005, she essentially requested a Fisher order, providing for state-funded counsel at a rate higher and on different terms than legal aid provides. She demonstrated that Mr. Wills had made extensive attempts to find counsel who would agree to represent him on the terms of the Rowbotham order. She then gave a particularly compelling explanation as to why she and other criminal defence counsel found themselves unable to take cases on at legal aid rates:

> When I got called to the bar in 1987, the rate I was paid [for legal aid] was about $67 per hour. It is now $92.34. I have received on average an increase of about $1.30 per year per hour. That is frankly insulting. Apart from being insulting to most of us who work so hard and are so dedicated to this profession, it has become virtually impossible to stay afloat in the City of Toronto and its areas at that rate. Costs have increased substantially in the practice. Staff fees have gone up, business taxes have gone up, Law Society dues, and insurance fees. Living costs have increased.... Most criminal lawyers who have attained a certain level of experience stopped taking on legal aid retainers simply because they cannot. A lot of us who feel we cannot do it any more, nonetheless have still continued to take the odd case on Legal Aid to do the right thing when circumstances required it, but we must, by necessity, limit ourselves. For if we bankrupt our practices, the whole thing goes down for no reason ....
>
> There is a crisis in Ontario with the Legal Aid Plan that our Attorney General is well aware of.

150 Justice Shaughnessy ruled on this informal Fisher application on April 28, 2005. He again featured Mr. Wills' personality and his penchant for antagonizing witnesses, jurors, and counsel, as well as the challenge he would pose for the trial judge. While noting that "bad behavior cannot and should not be rewarded by

offering the accused anything he desires," Justice Shaughnessy made the order, explaining:

> The facts of this particular case, the history of this proceeding and the expense incurred by the Ministry of the Attorney General in the appointment of an *amicus curiae* cumulatively suggest that the circumstances of this case and the unique personal characteristics of the accused are such that a fair trial can only be achieved by having him represented by experienced and skilled legal counsel. The evidence before the court is that experienced, competent legal counsel cannot in the particular circumstances of this case be obtained where legal compensation is paid in accordance with the Legal Aid Tariff ....
>
> Without reasonable and sufficient funding of counsel, there is a real potential to render this proceeding unfair ....

151 Justice Shaughnessy granted the Fisher application on the following terms:

> Ms. Wasser will be compensated for her legal fees at the rate of $200 per hour, to be paid by the Attorney General. There will be a junior counsel fee in the amount of $140 per hour, to be paid by the Attorney General. Travel time of counsel will be remunerated at the rate of $40 per hour plus 40 cents per kilometre to be paid by the Ministry of the Attorney General. Defence counsel will in due course, following review and preparation of the case, present a budget for the judicial pre-trial, the pre-trial motions and the trial. If it is appropriate and necessary, a student-at-law may be engaged to research and conduct interviews at a rate of $50 per hour. All disputes relating to accounts will be brought back to me. All payments are to be made by the Ministry of the Attorney General.

152 Soon after the Fisher order was issued, Ms. Wasser became counsel of record for Mr. Wills. In the absence of an administrative order, she tried to establish a protocol for payment. The acting Crown attorney advised her to send her accounts to the assistant Crown attorney who was handling the case. Ms. Wasser protested, noting that in other such cases the accounts are sent to the Ministry. Eventually the matter was directed to Ms. Thompson at the Crown Law Office. She received and reviewed Ms. Wasser's accounts, and was directed not to discuss the case with the prosecuting Crowns.

153 From that point forward, Ms. Thompson administered Ms. Wasser's accounts, reviewing them and securing additional information when required – until

September 6, 2005, when Mr. Wills fired Ms. Wasser and her co-counsel, Breese Davies. In the time they acted for Mr. Wills, they had attended to pretrial matters and had reviewed the massive disclosure, accumulating legal fees of $77,375.

154 Mr. Wills ultimately told Justice Shaughnessy he and Ms. Wasser could not work together, as he was "not about to be muzzled and have my case hijacked by anyone either." For the next two months, he appeared at pretrial hearings without a lawyer.

155 On October 28, 2005, Justice Shaughnessy, concerned that Mr. Wills might not find anyone who would work with him by the time pre-trial motions began, reappointed Mr. Borenstein as *amicus curiae*. Fearing that even if Mr. Wills did find counsel in time, he could well fire them during the trial, Justice Shaughnessy ordered Mr. Borenstein to be available on a standby basis. He was paid $200 an hour, as well as a standby rate of $100 per hour (up to five hours a day) for any scheduled hearing dates. The costs were mounting, but the worst was yet to come.

156 On November 29, 2005, now appearing before the assigned trial judge, Madam Justice Michelle Fuerst, Mr. Wills told the judge that he wanted to appoint Munyonzwe Hamalengwa as his "co-counsel" under the Fisher order. He intended to continue to speak in court and personally question witnesses as he chose, while Mr. Hamalengwa would participate according to his directions. That motion, made formal on December 5, 2005, when Mr. Hamalengwa was not even in the country, was dismissed. Justice Fuerst ruled that the Fisher order did not apply to counsel acting with an accused in such a fashion.

157 Mr. Wills insisted on confirmation that the Crown would abide by the Fisher order if new counsel was appointed. Kenneth Campbell, Director, Crown Law Office – Criminal, wrote to Justice Fuerst confirming they would abide by the Rowbotham order, but Mr. Wills was not content with that. Mr. Campbell amended his letter to indicate the Fisher order would stand as well.

158 On December 22, 2005, Mr. Hamalengwa appeared in court in person and sought a six-week adjournment, until January 18 or 19, 2006, to settle his retainer. Justice Fuerst, understandably anxious to get on with the long-delayed trial, compromised, adjourning the matter to January 4, but Mr. Hamalengwa did not show up. Instead, he sent a message to Crown counsel that he had not finalized his retainer and asked again for an adjournment to January 19. Justice Fuerst put the matter over to the next day. Mr. Hamalengwa was still not there, and Mr. Wills did not co-operate in setting a schedule for motions, so the matter was put over to January 19 after all.

159 Mr. Wills had remained unsatisfied with Mr. Campbell's written promise to abide by the Rowbotham and Fisher orders. In a letter to Mr. Campbell dated January 2, 2006, Mr. Hamalengwa expressed his "grave" concerns over the phrasing of Mr. Campbell's letter, and alluded to problems Ms. Wasser had in the payment of her fees. The Office of the Attorney General is adamant that it did not receive this letter until May 30, 2006 – *after* Mr. Hamalengwa began to run into problems in getting his accounts paid. What matters is that in early January, in order to remove an apparent impediment to the retention of a lawyer, Justice Fuerst once again prevailed on the Attorney General to assuage Mr. Wills' concerns. On January 18, 2006, Mr. Campbell wrote again, providing further details concerning the Ministry's commitment to pay accounts for reasonable fees and disbursements. He also confirmed that neither the accounts nor information about them would be revealed to Crown counsel, and he noted that billing invoices should be sent directly to his office. Mr. Campbell did not allude in any of his correspondence to the Attorney General's practice of having Legal Aid Ontario review accounts.

160 On January 19, 2006, Mr. Hamalengwa became counsel of record for Mr. Wills. He requested an adjournment to review the file and the matter was put over to March 2, 2006.

There's No Accounting for It: The Need for Administration

161 On January 24, 2006, Mr. Hamalengwa submitted his first bill to the Ministry, for $17,214.85. The account included substantial detail. Ms. Thompson advised Mr. Hamalengwa that he should not be providing the Ministry with such detailed information because of privilege issues. She asked that he provide detailed accounts to Legal Aid Ontario for review.

162 A month later, Mr. Hamalengwa wrote to Ms. Thompson, noting that at her direction he had delivered his detailed statement of account to the attention of the director of Lawyer Services and Payments at Legal Aid Ontario. He was troubled by having to do so. He noted that there was nothing in the court orders requiring Legal Aid Ontario to vet his accounts. He wanted to be shown documentation where this obligation was set out, and asked who made the decision to subject his accounts to review.

163 On March 2, 2006, the director of Lawyer Services and Payments wrote to Ms.

Thompson at the Ministry about the account that Mr. Hamalengwa had submitted. She approved it because the number of hours billed at that stage would have been approved if this had been a legal aid file, provided a discretionary increase request was received. She said the time spent (75 hours between November 21, 2005 and January 22, 2006) was what might be expected for a case of this kind. She also expressed the caveat that if this had been a legal aid case, it would have gone through the Big Case Management program and a budget would be established. The Ministry paid the account 11 days later.

164 Ms. Thompson received a second bill from Mr. Hamalengwa on March 8, 2006, dated March 6, for $28,220.22. This time, the account did not contain any particulars, not even a breakdown of hours. Ms. Thompson telephoned Mr. Hamalengwa's office and was advised that the fee represented 122.9 hours of counsel time and nine hours of travel.

165 On the same date, Mr. Hamalengwa wrote to the director of Lawyer Services and Payments, in a letter copied to the Ministry, essentially refusing to submit an account explanation to Legal Aid Ontario. He protested that in the absence of any requirement in the Fisher order for third-party supervision of counsel's accounts, the "hours in this case are therefore unlimited."

166 The following day, March 9, 2006, Ms. Thompson wrote to Ruth Lawson, Acting President and Chief Executive Officer of Legal Aid Ontario, requesting assistance with the Wills matter. She referred to previous discussions she and Ms. Lawson had held with Legal Aid Ontario's director of Big Case Management and the then Newmarket Crown attorney, Robert McCreary. Ms. Thompson relayed her understanding from Assistant Crown Attorney Harold Dale that after initial disclosure, Justice Shaughnessy had directed that defence counsel's accounts be reviewed by an independent third party, i.e., Legal Aid Ontario. She asked that Legal Aid Ontario provide her with its position in writing before April 28, 2006, when the matter was scheduled to come again before Justice Shaughnessy.

167 Legal Aid Ontario's director of Lawyer Services and Payments replied to Ms. Thompson's letter on March 27, 2006, noting that Mr. Hamalengwa did not agree to a process for third-party supervision of his accounts by Legal Aid Ontario. She said Legal Aid Ontario helps administer such cases as "a matter of courtesy" and cautioned that before Legal Aid Ontario would agree to an ongoing role, it would appreciate the Attorney General reaching a mutual understanding with Mr. Hamalengwa. She said this was important because Legal Aid Ontario usually deals with large cases such as the Wills prosecution through the Big Case Management program, which calls for co-operation of counsel.

168 Two weeks later, on April 10, 2006, this same director wrote to Mr. Hamalengwa that Legal Aid Ontario's role, if any, in assisting with the settlement of his accounts in the case needed to be resolved between himself and the Crown Law Office – Criminal. She requested that he not forward any further materials or accounts until the matter was clarified.

169 On April 11, 2006, the Ministry received Mr. Hamalengwa's third account, for $31,871.56. No particulars were provided. The following week, he wrote to Ms. Thompson, again pointing out that there was no mention of third-party review in the original Fisher order or in Mr. Campbell's letters to Justice Fuerst.

170 On April 28, 2006, Ms. Thompson delivered a cheque at court to Mr. Hamalengwa for $28,220.22 to satisfy his second account.

171 On May 18, 2006, Michal Fairburn, Crown Counsel, Crown Law Office – Criminal, wrote to Mr. Hamalengwa concerning his refusal to submit bills of account to Legal Aid Ontario. She noted:

> You must understand that this is a completely unacceptable manner in which to proceed. To be clear, this is not because anyone questions your integrity, but, rather, because a duty is owed to the public to administer their funds in a responsible and accountable manner.... This objective becomes all the more important in a case such as this where it is entirely reasonable to expect that the billing process will go on for some significant period of time and involve a tremendous amount of public money.

172 The next day, May 19, 2006, the Ministry received Mr. Hamalengwa's fourth account for $43,377.41, without particulars. On May 25, 2006, Mr. Hamalengwa responded to Ms. Fairburn's letter, again questioning what authority existed for a third-party review of his accounts.

173 The Ministry was growing increasingly concerned about the nature of the work that it was being asked to pay for in the Wills matter. There was certainly concern about the amount being billed and no doubt some disquiet about whether the expenditures were truly warranted. Mr. Hamalengwa had even gone to the Supreme Court of Canada to challenge one of Justice Fuerst's scheduling orders; the court rejected his motion on May 26, 2006, accepting the Attorney General's position that the motion was frivolous and agreeing that costs for the motion should not be covered by the Fisher order.

174 Not surprisingly, given its concerns, the Ministry of the Attorney General delayed

payment of $70,000 in bills submitted by Mr. Hamalengwa, who complained to Justice Fuerst about the status of his accounts on May 29, 2006. She obtained assurances from counsel for the Attorney General that the bills would be paid, and ordered that the pre-trial motions proceed. A motion brought by the defence to permit Mr. Wills to sit at the counsel table then pre-empted the order of motions Justice Fuerst had set – remarkably, it was heard over nine days between May 29 and June 27, with Justice Fuerst finally allowing the request on September 11, 2006, subject to conditions.

175 Clearly the situation was far from satisfactory. While the Ministry was legally required to pay the defence costs, because of the privileged nature of legal accounts, it could not request disclosure of sufficient information to ensure the accounts were proper. And with Mr. Hamalengwa refusing to accept the practice of providing his accounts to Legal Aid Ontario for review, the Ministry was left to pony up without any assurance that public funds were being appropriately spent. The trial had not even started – and the bill was quickly approaching $200,000.

Defining 'Vetting'

176 Faced with this Catch-22, Ms. Fairburn brought a motion before Justice Shaughnessy on June 6, 2006, asking for directions on behalf of the Ministry. With his client frequently interrupting him, Mr. Hamalengwa argued that third-party review through Legal Aid Ontario did not fall within the judge's order and was not mentioned in Mr. Campbell's letters. He even suggested that the Ministry was racially motivated in making this request, since it had not been imposed on Ms. Wasser or the *amicus curiae*, Mr. Borenstein.[23]

177 Justice Shaughnessy made it clear that he had always intended that counsel's accounts be subject to some form of financial oversight:

> The amount of payments has been determined and detailed, however, over the course of the various applications it became apparent that a process was necessary to satisfy accountability requirements. That is apparent even in the transcript of April 28, 2005 … The Big Case Management program becomes, in my opinion, a logical tool to address the process of payments of accounts.

[23] Mr. Hamalengwa is black and the other counsel referred to are white. Ms. Wasser had been discharged before she could settle the budget she had agreed to furnish. Mr. Borenstein was counsel for the Court, not for Mr. Wills.

> The issue before this court is whether there should be an independent third-party review of accounts and setting budgets for the defence which meets the needs of accountability in relation to public funds and yet, at the same time, safeguards the solicitor/client relationship.

178 Accordingly, Justice Shaughnessy made the following order as an addendum to his order of April 28, 2005:

> I hereby order and direct that Mr. Wills' counsel is to meet with Legal Aid Ontario in a manner consistent with the "Big Case Management program" to work out a budget of hours needed to complete this case.
>
> I further order and direct that Mr. Wills' counsel will submit all bills of account and billing records to Legal Aid Ontario in order that these accounts may be vetted and approved by staff at Legal Aid Ontario.

179 When questioned by Mr. Hamalengwa as to what he meant by the phrase "vetted and approved by staff at Legal Aid," Justice Shaughnessy advised: "Vetting, I think, is reviewing, adding up, making sure the math is correct. That's kind of the detail, I would think, but understand this is not a Legal Aid account."

180 Mr. Hamalengwa asked: "How is Legal Aid going to say you need this many hours or you don't need this many hours?"

181 Justice Shaughnessy questioned whether Mr. Hamalengwa had ever been involved in the Big Case Management process, and suggested that "there has to be a meeting to structure it," and that Mr. Hamalengwa would refer to the hours he expected to put in. Mr. Hamalengwa was concerned that there might be unexpected motions and he did not want Legal Aid Ontario putting him in a "straightjacket." Justice Shaughnessy reassured him:

> This is not Legal Aid money. It's coming out of the Crown Law Office, and so the budgetary constraints and concerns that Legal Aid would otherwise have don't present in the same form as we have under a Fisher order ....

182 On June 8, 2006, Ms. Thompson wrote to Legal Aid Ontario's director of Lawyer Services and Payments, attaching a copy of Justice Shaughnessy's June 6 order and asking that she confirm that Legal Aid Ontario was prepared to assist. Ms. Thompson also forwarded the four accounts she had paid to Mr. Hamalengwa to the Director of Big Case Management, for his information. She advised our investigators that she did this because she thought that the money that had already

been paid should be taken into account when arriving at a budget. The Ministry was quite confident at this stage that Legal Aid Ontario would follow its customary practice to ensure that a reasonable budget was set and adhered to. Unfortunately, after the administration of funding came into Legal Aid Ontario's hands, things did not go as planned.

Doing the Math

183 The director of Big Case Management wrote to Mr. Hamalengwa on June 14, 2006. His letter was copied to Justices Fuerst and Shaughnessy, the director of Lawyer Services and Payments, Ms. Thompson at the Ministry, and Harold Dale and Jeffrey Pearson, the assistant Crown attorneys prosecuting the Wills case. In it, he wrote:

> We are on notice regarding Mr. Justice Shaughnessy's order of June 6, 2006, and we are content to comply with it as much as is possible as a courtesy to the court, your client, and the Office of the Attorney General. In that regard, kindly complete the attached Trial Opinion Guideline at your earliest convenience and return it to the undersigned ....
>
> Once this form is completed and returned to us, we will arrange a meeting at your earliest convenience to set a budget, in line with our usual process .... Our role will be to manage the budgetary process mandated by the order in accordance with our standard policies and procedures, except for the proscribed tariff rate for remuneration.

Mr. Hamalengwa filled out the form, but left some parts blank, and some of his entries were not specific enough to permit a budget to be arrived at, so on July 6, 2006, the Big Case Management director wrote to him, seeking greater specificity. He also suggested that if the case budget was to exceed $75,000, it would be normal practice to require an appearance at an Exceptions Committee meeting.

184 On July 26, 2006, he wrote to Mr. Hamalengwa yet again, referring to Justice Shaughnessy's order and proposing that:

> ... perhaps we should meet to discuss a number of items on the case management guideline which you felt unable to address, including, but not limited to:

- Defences contemplated
- Estimate of hours of preparation before and during trial
- Estimate of trial length
- Motions contemplated by defence and anticipated from Crown
- Disclosure issues settled and disclosure issues unsettled
- Reasons for requesting co-counsel
- Detailed disbursement request

185 The Big Case Management director was quite solicitous, noting:

> We recognize that this case is unusually difficult and that the court has requested an hourly preparation rate higher than the LAO tariff. We therefore wish to assist in every way to ensure that this process is expeditious and accommodating to you while bearing in mind our need to ensure its compliance with our usual process.

186 But Mr. Hamalengwa did not do as requested. Instead, on August 17, 2006, he sent a response enclosing a partial transcript from the June 6, 2006 proceedings, which he referred to as a "clarification." He noted in closing: "I hope you have by now 'vetted' my last account for payment." The "clarification" was Justice Shaughnessy's aforementioned explanation of what "vetting" meant, and his comments in response to Mr. Hamalengwa's concern about being put in a "straightjacket" by Legal Aid Ontario.

187 Mr. Hamalengwa met with Legal Aid Ontario's director of Big Case Management the next day. The director told our investigators that at that meeting, supported by the transcript of his exchange with the judge, Mr. Hamalengwa insisted that he was not required to provide the information that Legal Aid Ontario was requesting. He said Mr. Hamalengwa maintained that Legal Aid Ontario was only responsible for "adding up the math" and could not constrain his conduct of the defence. Mr. Hamalengwa further told him that he considered his funding to be "unlimited" and he would need to work 15 to 18 hours a day. Finally – in what should have been seen as a warning sign that things were out of control – he said Mr. Hamalengwa told him he was not in a position to set a budget because he was leaving the articulation of motions to Mr. Wills.

188 Remarkably, the Big Case Management director appears to have accepted Mr. Hamalengwa's position. He accepted that it was not the role of Legal Aid Ontario to work out a budget and that it should simply add up the math. He did tell us that in addition to checking the math, he also looked for obvious signs of fraud.

189 It is very clear to me that the director was moved to accept this largely hands-off approach in part because vetting Ministry accounts is considered by Legal Aid Ontario to be a mere matter of courtesy. When it was pointed out to him by our investigators that the order in fact required review and vetting of the accounts in a manner consistent with Big Case Management practices, his reaction was to disclaim Legal Aid Ontario's responsibility. He maintained it was Mr. Hamalengwa who was bound by Justice Shaughnessy's order to work out a budget with Legal Aid Ontario, and that Legal Aid Ontario's role was "tangential" with respect to the funding order. Case law, he said, did not support court orders binding the corporation.

190 The director of Big Case Management told our investigators that he discussed his meeting with Mr. Hamalengwa with his manager at that time – the director of Lawyer Services and Payments. He told us he considered himself to be "between a rock and a hard place." He said he had received no instructions to contact Ministry officials to advise them of the situation and that, in any event, he was concerned that if he were to do so, that would have meant divulging Mr. Hamalengwa's comment that he was leaving decisions about motions to Mr. Wills. He considered this to be a matter of solicitor-client privilege that could not be disclosed.

191 Accordingly, he did not attempt to contact Ms. Thompson to indicate that Mr. Hamalengwa had a different view of the order than the Ministry, and that he, the Big Case Management director for Legal Aid Ontario, was accepting it. Nor did he even seek to review the full transcript. Instead, he wrote to Ms. Thompson on August 21, 2006 regarding a June 25, 2006 account submitted by Mr. Hamalengwa for $67,566.25, stating:

> **We have reviewed the account of details and determined that the account is proper as to both fees and disbursements, so we are recommending that you pay him as agreed.**
>
> **Please also note that we did meet Mr. Hamalengwa to discuss case management guidelines and budget requirements for the remainder of the case.**

It is not surprising that the letter, implying that budget discussions had occurred, left Ms. Thompson confident that the budget process was proceeding as the Ministry had intended, and as Justice Shaughnessy had ordered.

192 Through the fall of 2006, the Big Case Management director continued to vet Mr. Hamalengwa's accounts by simply checking the math and watching for obvious

fraud, or, to use his words, looking for "all-expense-paid trips to Hawaii." The accounts added up: On October 19 it was $26,441.81; on November 3 it was $50,307.98 for Mr. Hamalengwa plus $5,130.40 for his co-counsel, Richard Stern. (Mr. Stern was soon replaced by Samuel Willoughby as co-counsel for a two-month interlude before he too was fired by Mr. Wills.)

193 The rubber-stamp vetting continued, with the Big Case Management director approving Mr. Hamalengwa's accounts as follows:

January 8, 2007:

- $59,147.63 from September 29, 2006
- $51,313.74 from October 31, 2006
- $52,056.96 from November 30, 2006

February 28, 2007:

- $40,036.32 from February 1
- $71,100.04 from February 22

April 19, 2007: $62,564.41 from April 12, 2007
April 27, 2007: $11,564.06 (for work done by Mr. Willoughby in December and January)
May 9, 2007: $76,385.00

Each bill was sent to Ms. Thompson with the misleading endorsement:

> We have determined that the account is proper as to both fees and disbursements and we can recommend that you pay [Mr. Hamalengwa] at your earliest convenience.

194 The Big Case Management director conceded to us that even when he found Mr. Hamalengwa's disbursement claims to be "out of the ballpark," that same letter went out. He said by way of explanation that it was difficult to tell if "out of the ballpark" claims are inappropriate "when you're not managing a case."

195 It is impossible to know precisely what fees and disbursements would have been denied with proper vetting, but two things are clear. Huge fees were being accumulated on endless motions that were almost always unsuccessful. A section 11(b) *Charter* motion to stay the proceedings for unreasonable delay was dismissed because, as was obvious, most of the delay was caused by Mr. Wills. A change of venue application brought because of "prejudicial pretrial publicity" was snuffed because Mr. Wills himself had sought media publicity – he had asked the court to order York Regional Police to issue a media release that his trial had

begun, he had attempted to issue his own press release announcing he was on a hunger strike, and he had directed Mr. Hamalengwa to ask Justice Fuerst to lift a publication ban that she was obliged by law to leave in place. There was also an extensive but hopeless bail release application, an absurd attempt to allow Mr. Wills to cross-examine witnesses personally, and even a motion to exhume Ms. Mariani's remains, so the body could be examined by an unidentified pathologist. The latter was, in the words of Justice Fuerst, "simply a fishing expedition." All of these desperate motions were brought at public expense, without scrutiny.

A Plea for Clarity

196 On May 9, 2007, Legal Aid Ontario's director of Big Case Management sent an electronic message to the director of Lawyer Services and Payments after discovering that the Wills case billings being reviewed by Legal Aid Ontario added up to nearly half a million dollars – $490,253.89. He wrote:

> FYI
>
> We are way out of our financial league on this one, but his accounts do add up. In the real world we should get a 9% management fee or $44,123.

197 While the Big Case Management director was obviously concerned about the large amounts being billed, it is disturbing and unfortunately telling that his main issue appeared to be that Legal Aid Ontario was not being compensated for the work done in reviewing the accounts in the Wills case (whereas for federal accounts, it received a 9% management fee). If anything, the "real world" reaction that Legal Aid Ontario's handling of this case deserved was outrage.

198 When counsel for Legal Aid Ontario, had appeared before Justice Shaughnessy on February 2, 2005, he had suggested that the Crown and Legal Aid Ontario were in general negotiations to set up a protocol for administering Rowbotham matters. However, based on our interviews with Legal Aid Ontario officials, we understand that these discussions were never more than informal. It wasn't until May 10, 2007 that Legal Aid Ontario expressed renewed interest in establishing a protocol.

199 That day, the director of Lawyer Services and Payments wrote an internal memorandum called "Review of Accounts for Non-Legally Aided Clients at Crown's Request." It emphasized the time commitment required of Legal Aid Ontario for these reviews, noting:

> While the number of accounts involved in this process is not large, senior staff's time is necessarily used, diverting them from work on LAO files. The Rowbotham matters where LAO has attempted to case-manage the file are the most time-consuming. They involve correspondence to counsel as well as the provision of our opinion to the Crown, negotiation of a budget and ongoing consideration of disbursement authorization requests.

200 The memorandum continued that in the absence of billing guidelines, staff often lacked sufficient detail to form an opinion on whether or not to pay an account. It also bemoaned Legal Aid Ontario's rather powerless position in these cases, noting:

> In cases where LAO has been asked to assist by case-managing a matter, we are in a frustrating situation if the lawyer does not agree to our involvement. Case management depends on a mutual agreement to negotiate.... In a non-legally-aided case, LAO has no negotiating power and is a third party to the relationship between the government and the lawyer.

The memorandum ended with a plea for clarity:

> It would be helpful to have the Crown's and LAO's role reduced to writing, including what materials counsel is told to provide, how the account gets here, what format LAO's response should take, understanding that lawyer is copied on our reply, what information the Crown needs from LAO, what to do if a negotiation is unsuccessful, what to do if a nominal budget is exceeded.

The Trial Founders

201 Justice Shaughnessy was prescient when he appointed a "friend of the court" to be on standby in case Mr. Wills fired his trial lawyer. He did just that. Mr. Hamalengwa joined the carnage of Wills' lawyers, fired after receiving $677,604.18 in fees and disbursements, paid out of the public purse over 18 months – before the first witness was even called.[24]

[24] Mr. Hamalengwa has an outstanding bill for another $92,038.56 that has not been paid.

202 Raj Napal was promoted from co-counsel to lead counsel and his appointment was confirmed by court order on May 18, 2007. He immediately wrote to the prosecutors describing the 18 expert witnesses the defence intended to call.

203 These included a pathologist, neuropathologist, emergency room doctor, fingerprint expert, neurologist, a biomechanical expert, kinesiologist, an accident reconstruction expert and even entomologists, all of whom would challenge the Crown's evidence on the cause and circumstances surrounding Ms. Mariani's death – unless the Crown agreed to the defence's interpretation (i.e., that she fell backwards from the staircase and hit her head on the ceramic floor). Mr. Napal also proposed to call a forensic psychologist and/or similar experts unless the Crown admitted that Mr. Wills suffered from a mental and/or behavioral condition providing a wholly innocent explanation to his actions in relation to Ms. Mariani.

204 Calling more than five expert witnesses at a trial, however, requires the judge's approval.[25] When Mr. Napal appeared before Justice Fuerst on May 18, 2007, to be substituted for Mr. Hamalengwa as counsel of record, she expressed her deep concern about the manner in which the defence was proceeding, in light of the fact that it was being supported by public funds:

> I don't have a problem with substituting your name for Mr. Hamalengwa's, but what I do want to put on the record is that these are public funds, and I'm not trying to pry into how you prepare and organize your defence, but by the same token these are public funds. When I hear discussion about the possibility of as many as 18 defence experts, I have to question whether there shouldn't be some sort of review mechanism as to the appropriateness of the disbursements and the fees ....

205 Both Mr. Napal and Mr. Wills assured Justice Fuerst that there was a review mechanism in place. She accepted Mr. Napal's word but remained skeptical, referring to the "seeming limitless funding" that was being provided. She said that if there were no review mechanism in place, she would certainly consider putting one in.

206 What Justice Fuerst was not told, and what the Ministry of the Attorney General still did not know, was that Legal Aid Ontario had *not* placed any controls on the defence spending. There had been no estimate of hours for preparation or court attendance. There had been no assessment of whether the motions the defence

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[25] *Canada Evidence Act*, R.S.C. 1985, c.C-5, s.7.

proposed to bring had a reasonable prospect of success or were necessary. There was no budget at all, and the review mechanism was virtually non-existent.

207 In fairness to Mr. Napal, it appears that he was similarly confused about the nature of Legal Aid Ontario's oversight of defence counsel accounts. On May 25, 2007, he wrote to the Big Case Management director to tell him he had taken Mr. Hamalengwa's place. He indicated that it was his understanding that he was to provide his invoice as well as a copy of the detailed time docket for the period of each invoice. He understood that Legal Aid Ontario would check and tally the time dockets to ensure their accuracy with respect to the accompanying invoices. He also requested, so as to avoid duplicate work "and needless expenditures of the public coffers on my part in this matter," copies of documents submitted by previous counsel.

Staunching the Flow: The Ministry Catches On

208 One would have thought that the full story of the scandalous costs of the Wills case would have come out on May 30, 2007, when Ministry of the Attorney General staff met with a Legal Aid Ontario working group to consider, among other things, Rowbotham orders. Remarkably, there is no reference to the Wills case in the meeting minutes.

209 But the next day, May 31, 2007, it began to erupt at last. The director of Big Case Management responded to Mr. Napal's letter of May 25 and copied Ms. Thompson at the Ministry. He wrote:

> As a courtesy to the court, the Ministry of the Attorney General and Mr. Hamalengwa who was previous lead counsel, we were merely vetting the accounts of defence counsel by reviewing the math. We do not provide copies of detailed accounts to the Ministry and we do not retain the accounts of all previous counsel appearing on this matter. We request therefore that you provide us with your detailed accounts and a separate summary indicating just the total account for fees and disbursements but not including account details ....
>
> As we do not case-manage this matter, we suggest that you obtain any documentation you seek directly from previous counsel.

210 Along with this missive, he sent the Ministry the May 24, 2007 account for Mr. Napal in the amount of $32,286.84, which he endorsed as usual as "determined to

be proper both as to fees and disbursements."

211 That same day, he spoke to Ms. Thompson by phone as well. It was during that conversation, described by Ms. Thompson in a court affidavit, that the penny dropped:

> [The director] indicated that the case had not been subjected to any of the Big Case Management procedures such as setting up a reasonable budget or scrutinizing the appropriateness of applications and/or disbursements. In essence, he informed me, for the first time, that he was re-doing counsel's math, and if it was correct, forwarding the accounts as "approved" for payment.
>
> I was shocked by these comments … as it was immediately clear to me that he had not fulfilled the role that I had understood he was playing as a result of Mr. Justice Shaughnessy's June 6, 2006 order ....[26]

212 Ms. Thompson told our investigators that when she spoke to the Big Case Management director, he suggested that what the Ministry needed was an independent third party to review the accounts, such as the Public Trustee's Office. She told us:

> I was shocked, I was horrified, I said … "this is an awful lot of money." He said "I know, if this was a legal aid case you probably wouldn't have paid more than $300,000." Then, I felt nauseous, I really felt nauseous and I also felt angry. I said, "Well, why didn't you say something if it wasn't working? Why didn't you go back before the court, why didn't you call us or tell us ...
>
> ... he kept saying "it doesn't fit our Big Case Management model" and I kept saying "I don't understand that" ...

213 The Big Case Management director remembers the conversation with Ms. Thompson somewhat differently. He told our investigators:

> I get a call from Kerry Lee Thompson saying, "Why aren't you doing more of this?" Without telling her what I couldn't tell her, I basically said that, I asked her if she had any idea how much money the Ministry of the Attorney General had spent, because she writes the cheque, because it's their money, it's their judiciary obligation. Although we had … I suppose

[26] *R. v. Wills*, (14 June 2007). Central East Region 02/07/31 (Ont. Sup. Ct.) (Evidence, Affidavit of Kerry Lee Thompson, sworn June 11, 2007 at para. 39, 40).

> a combined … an adjunct obligation to do something, that wasn't totally clear, but certainly, I asked her if she had any idea how much money they'd spent to this point of the trial. She said no, and I asked her if she'd been adding up the math herself and she said no, and I said "here's the amount" and I asked her if she had actually told her boss what the amounts were, and she said no and I asked her who her boss was and she told me, she said that she had shared some of the information about the amounts with her colleague …

214 On June 5, 2007, Mr. Campbell, director of the Crown Law Office – Criminal, now having learned the horrid truth, sent a blistering letter to the Big Case Management director at Legal Aid Ontario, objecting to his statement that Legal Aid Ontario was complying with Judge Shaughnessy's order "as much as possible." It was, after all, a judge's order. Mr. Campbell reminded him that the order was made only after full consultation between the Ministry and Legal Aid Ontario's Director of Lawyer Services and Payments. And he said the practices that the Big Case Management director had adopted were:

> … in direct breach of Mr. Justice Shaughnessy's order and in direct conflict with the Ministry of the Attorney General's understanding of the role that you agreed to play in this matter over the last year. This is a matter of utmost and urgent concern and, unfortunately, requires that an application be immediately brought before Mr. Justice Shaughnessy.

215 The Ministry of the Attorney General now moved swiftly to try to staunch the financial flow in the Wills case. On June 5, 2007, Ms. Fairburn wrote to Mr. Napal, telling him that the Ministry had only recently learned that the manner in which the accounts had been handled was inconsistent with the order of Justice Shaughnessy and she expressed the "utmost concern of the Attorney General." The next day, Ms. Fairburn wrote to the Superior Court of Justice, urgently asking to bring an application before the courts regarding Justice Shaughnessy's order.

216 By this time, things had already reached a critical point in Justice Fuerst's court. The judge was becoming increasingly troubled about the money train that was apparently hurtling down the track with no one putting on the brakes. She began to urge that Mr. Wills' counsel act with some restraint. She had already commented on the revolving door of lawyers and the long list of meritless motions. Then, on June 5, 2007, there was the fingerprint fiasco.

217 From the start of the trial, Mr. Wills had admitted that he had put Ms. Mariani's body in the garbage bin. Yet now Mr. Napal informed the judge that the defence was going to challenge the manner in which the Crown had obtained evidence of

fingerprints on the bin. That was enough to impel Justice Fuerst to remind Mr. Napal that by using public funds he had an "obligation … to conduct the proceedings in a reasonable manner." She wondered out loud what was going on: "Positions have been taken, motions have been brought … matters have been put in issue … that … never would have occurred if an individual, as a person of modest means, were funding his or her own defence." And then she warned:

> Quite frankly, I would not want to be in your position, if I were counsel, of someone down the road suggesting that the funding that was received was inappropriately received. I'll just put it that way.

218 The next day was even worse. Justice Fuerst learned that a student on the defence team, Mr. Phillip Viater, had hired a childhood friend – a fashion photographer – to manipulate gruesome images of the container that held the remains of Ms. Mariani and other items and have them cropped and developed for a "slide show." The photographer brought the images to the local Japan Camera store in the Hillcrest Mall in Richmond Hill to be developed and copied. It was not only a pointless legal exercise and an offence to the dignity of Ms. Mariani to treat photos of her remains in such a cavalier manner – it was also a clear breach of the obligation of counsel to maintain confidentiality over information disclosed in a criminal case. When Harold Dale, the prosecuting counsel, suggested that the matter was "slowly becoming a police matter," Justice Fuerst commented: "It's also becoming potentially a Law Society matter. That's how concerned I am about it." Justice Fuerst directed detectives to attend at the photo shop and seize any remaining pictures. She also called the photographer before her on June 7, 2007, for questioning. The photographer indicated that his services cost about $13,000, with about $2,400 to develop some 500 photographs.

219 Around this time, it also became apparent that Mr. Viater was paid the "student-at-law" rate of $50 an hour specified in Justice Shaughnessy's order, although that term generally refers to an articling student.[27] Mr. Viater was in law school, but was not under articles.[28]

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[27] For instance, the Articles of Clerkship of the Law Society of Upper Canada, refer to the "student-at-law" and their "principal." Students-at-law are also governed by the Law Society of Upper Canada as a part of its licensing program. See online: Law Society of Upper Canada http://rc.lsuc.on.ca/pdf/licensingprocesslawyer/articling/ar45memWhatYouNeedToKnow.pdf (date accessed: 21 December 2007).

[28] Mr. Viater advised our office that he never represented himself during the proceedings as a student-at-law, and was well aware of the distinction between a student of law, which he was when he joined the defence team in January 2006, and an articling student. Still, it was not the first time that Mr. Viater had also run afoul of Justice Fuerst. Previously, after she ruled on June 1, 2007, that he was no longer permitted to sit at counsel table he was reprimanded twice for getting out of his seat and approaching Crown counsel or a court services officer to try to speak with them while court was in session. In addition,

220 On June 7, 2007, Justice Fuerst repeated her concerns about the abuse of public funds:

> It is also necessary for me to make some comment about the funding order made by Justice Shaughnessy on April 28, 2005. Mr. Napal and Ms. Scott are the third set of counsel to be funded under this exceedingly generous order. I suspect that the legal fees and disbursement billed to date are well over $100,000.00. I have been told that Justice Shaughnessy will hear an application about the funding order next week ....
>
> It is my opinion that the time has come for the Attorney General to look very carefully at the expenditure of public funds in this case. It appears to me ...that there is a very real risk that Justice Shaughnessy's funding order is being abused.

221 Justice Fuerst had hit the nail on the head, although she could not have imagined the extent of abuse; her estimate was eight sizes too small. By June 7, 2007, the Attorney General had paid out a whopping tab for the Wills defence of over $800,000.

Details, Details: The Judge's Order

222 The Attorney General's application to Justice Shaughnessy for directions relating to the administration of the Wills accounts was heard on June 14, 2007. By that time, the Attorney General and Legal Aid Ontario had negotiated a draft order for the judge to sign, but agreement was not an easy matter. Sensibly, Legal Aid Ontario wanted a dispute settlement mechanism in the order. For its part, the Ministry had wanted the order to provide for Big Case Management Exceptions Committee oversight, but Legal Aid Ontario objected because it relied on volunteers for such purposes. To solve these problems, the Ministry agreed to appoint a committee of three lawyers to provide recommendations about the budget and have the authority to resolve disputes between Legal Aid Ontario and

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he had been observed talking to Mr. Wills despite Justice Fuerst's direction that Mr. Wills was to remain silent. Mr. Viater had also violated the rules governing professional visits by bringing Mr. Wills' children into the area of the court cells where lawyers are permitted to speak with clients in custody without permission. On May 31, 2007, Mr. Viater had displayed in very large letters on his computer screen at counsel table words to the effect: "If the press have any questions, we can answer them." In addition, he approached a member of the media and offered to relay information between her and Mr. Wills.

Mr. Wills or his counsel. The Ministry retained three leading criminal defence lawyers to serve at a rate of $200 per hour apiece.[29]

223 It is clear from internal Legal Aid Ontario e-mails that at least its director of Lawyer Services and Payments was not happy about having its role mandated by a judicial order. In an internal e-mail of June 13, 2007, she expressed her discomfort with the "substantial degree of responsibility being foisted upon" Legal Aid Ontario. She did not want Legal Aid Ontario to be "bound by anything." She confided to Legal Aid Ontario's lawyer that "seeing this reduced to writing really makes me wish we did not have to be involved at all."

224 When the matter came before Justice Shaughnessy, he made it clear that he saw things differently. As far as he was concerned, his order of June 6, 2006 had been "clear enough" and in endorsing the joint agreement between the Ministry and Legal Aid Ontario he was simply "hammering out more detail in relation to an order that was made over a year ago and should have been followed." He made his displeasure with Legal Aid Ontario clear:

> I am shocked and dismayed in terms of the conduct of Legal Aid Ontario in not fulfilling the role directed by my order and which they assumed and confirmed in correspondence ....
>
> What has happened in this case is, as I have indicated, shocking in terms of the role of expenses, the lack of case management, notwithstanding the undertaking to do so, and I am actually disheartened that there could be an abandonment of such an important function, and particularly an abandonment of the function of accountability in relation to public funds as occurred in this matter ....
>
> In my opinion, it is shameful in the circumstances that my order and direction of June the 6th, 2006, was not followed. For reasons that escape me, Legal Aid Ontario shirked the responsibility that they undertook and was confirmed in correspondence on June 14 and August 25, 2006. [30] No explanation is proffered as to why Legal Aid Ontario resiled from their position, however, the consequences of their action are injurious to the public purse and public confidence in relation to the administration of justice.

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[29] To date, none of the three lawyers appointed have submitted accounts for the work they did.
[30] Justice Shaughnessy was likely referring to the Big Case Management director's letter to Ms. Thompson of August 21, 2006.

225 On June 14, 2007, Justice Shaughnessy issued a new order, with the following details:

1. Within 10 days of the date of this order, counsel to Richard Wills will provide Legal Aid Ontario, Big Case Management Director, a completed "Opinion Guideline" for Big Case Management hearings.

2. Upon receipt of the "Opinion Guideline", and within 14 days of this order, Legal Aid Ontario will set up a meeting between counsel to Mr. Wills and the Big Case Management Director, Area Director and/or other Legal Aid Official. Counsel will provide any and all information required by Legal Aid Ontario, beyond the "Opinion Guideline," for the purpose of arriving at a reasonable budget for this case. The budget will be negotiated by Legal Aid Ontario bearing in mind Big Case Management considerations.

3. In arriving at a reasonable budget, Legal Aid Ontario will take into consideration the rate of remuneration set out in my *Fisher* order dated April 28, 2005.

4. In arriving at a reasonable budget, among other appropriate considerations, Legal Aid Ontario will also take into account the number of preparation hours required on a per diem basis and the projected length of the trial.

5. In determining how many hours are to be budgeted for an articling student in this case, Legal Aid Ontario is to bear in mind my "Fisher" order dated April 28, 2005, that only permits funding of a student-at-law for "research and conducting interviews." Only an articling student is approved for funding under my "Fisher" order.

6. Counsel will be bound by a reasonable budget as agreed upon by Legal Aid Ontario and will provide accounts to Legal Aid Ontario in a format approved by Legal Aid Ontario.

7. Prior to any non-routine disbursements being incurred, counsel must apply in writing to Legal Aid Ontario for approval.

8. Prior to finalizing the budget for the case, Legal Aid Ontario will seek the input of a committee of three criminal lawyers … arranged by the Attorney General, who will provide their recommendations with respect to the appropriateness and reasonableness of the budget.

Among other appropriate considerations, this recommendation will be made bearing in mind the nature of the case and the stage of litigation.

9. Should any disputes arise respecting budgeting and disbursements matters, Legal Aid Ontario will contact the committee of three criminal lawyers … to resolve the dispute. Counsel to Mr. Wills will be bound by the decision of the committee. In the event that at any point there is dispute among the committee members, the majority view will prevail. Legal Aid Ontario will then make its payment recommendations based on the committee's decision.

10. As if this were a case funded by Legal Aid Ontario, the committee …will be responsible for determining whether the funding of this case and the type of funding in this case, is appropriate, bearing in mind considerations such as the repeated dismissal of counsel. In the event that the committee comes to a conclusion that ongoing funding is not appropriate, the Attorney General, Crown Law Office – Criminal, will be notified and an application for directions will be brought before me.

11. Counsel to Mr. Wills will provide monthly bills of account to Legal Aid Ontario. Those accounts will be reviewed and vetted for compliance with the budget and approval of disbursements. Counsel to the Attorney General will be notified of the amount recommended for payment by Legal Aid Ontario. If Legal Aid Ontario does not approve a portion of an account, it will simply indicate the amount of money not approved for payment.

12. This order applies to Richard Wills' current counsel and all counsel who may be retained by Richard Wills in the future.

13. If for any reason, Legal Aid Ontario cannot fulfill any aspect of this order, Legal Aid Ontario will immediately notify the Attorney General, Crown Law Office – Criminal, who will seek directions from me.

226 With Justice Shaughnessy's revised order in hand, Legal Aid Ontario began to diligently apply itself to the task of reviewing Mr. Napal's accounts, now under the director of Lawyer Services and Payments. It was too late to scrutinize all of his work; when the Ministry had learned that Legal Aid Ontario had not been vetting accounts properly it tried to delay paying Mr. Napal's $35,286.84 account from May 24, 2007, but Justice Fuerst, anxious to keep the trial going, strongly recommended immediate payment, which was done. But all subsequent accounts

were reviewed.

227 For example, Legal Aid Ontario wrote to Mr. Napal concerning his June 8, 2007 account, even though it predated the judge's latest order. It was recommended that the account be reduced from $47,061.29 to $39,144.01. This included compromises on the number of hours billed and disbursements claimed, including a denial of the $2,510.83 disbursement for photo printing which had so alarmed Justice Fuerst.

228 Even before a formal budget was agreed to, Legal Aid Ontario limits were imposed. Immediately, Mr. Napal's preparation time was limited to six hours a day for each full day in court, to be shared with junior counsel, with neither able to charge for more than 10 hours a day. A protocol for verifying claimed legal research was put in place, and Mr. Napal was required to clearly differentiate between court time and preparation time. He was advised that any non-routine disbursements were to be the subject of a request for an addition to the budget.

229 By July 20, 2007, a formal budget was established. It gave Legal Aid Ontario other benchmarks to gauge the propriety of the accounts, and direction to Mr. Napal on what he could bill. Some of the subsequent accounts were compromised, some modestly, such as the July 16, 2007 account (reduced to $56,612.90 from $56,756.65), and some more aggressively, such as the August 3, 2007 account, which was over budget by $5,043.81, resulting in a payment of $6,903.71 instead of $11,947.52.

230 There were also still outstanding accounts from Mr. Wills' earlier lawyers. Those accounts were reviewed using Legal Aid Ontario criteria. For example, accounts for Mr. Napal's co-counsel Suzie Scott dated June 10, 2007 and June 14, 2007 were revised modestly because she had billed one day at a little more than 10 hours.

231 Mr. Hamalengwa, meanwhile, had sent an account for work done in April and May 2007, for an additional $92,038.56 beyond the $677,604.18 he had already received for fees and disbursements. In keeping with the practice he had established with the Big Case Management director, he provided no particulars.

232 The Lawyer Services and Payments director wrote to him on August 20, 2007, advising that she would require an amended account showing start and end times of day for all services of half an hour or more, disbursement invoices for all disbursements over $100, an authorization request and/or explanation of a number of disbursements, and an opinion letter briefly explaining the services rendered during the time frame covered by the count.

233 Mr. Hamalengwa responded, apparently oblivious to recent developments, protesting that Mr. Wills' defence was pursuant to a Fisher order and therefore irrelevant to the Big Case Management format or legal aid rate. But he did provide an amended detailed statement of account and general information about some of the work he had done.

234 Even this, however, did not meet the new requirements. The bill included 271.1 hours of preparation time, of which 150 were simply docketed as "research" and 46 hours as "research/preparation." Legal Aid Ontario's Lawyer Services and Payments director advised the Ministry on September 13 that while the hours spent per day were not unusual in the context of the case, Mr. Hamalengwa's descriptions of work done were "sparse." Moreover, about 50 of the hours were billed between midnight and 6:00 a.m. – if this had been a legal aid case, an explanation would be sought. The disbursements claimed were also a clear problem – $32,795.89 was billed, when only $2,964.64 would have been paid if it had been a legal aid account.

235 Mr. Hamalengwa responded on September 22, 2007 with additional details, but they did not resolve the matter. It remains under review.

The Nightmare Ends

236 The trial of Richard Wills finally ended on October 31, 2007, with the jury finding Mr. Wills guilty of first-degree murder in the death of Linda Mariani after 65 days of preliminary hearing, 144 days of pretrial matters and an 84-day trial.

237 Thirteen lawyers had taken turns looking after Mr. Wills' interests, including two "friends of the court," Howard Borenstein and Andras Schreck. The 11 who stood directly with him include the three he retained privately, first Timothy and Peter Danson and then Todd White of Greenspan White. Dirk Derstine represented him *pro bono* as the first to try bringing a *Rowbotham* application. But the other seven were on the public dime: Cindy Wasser, assisted by Breese Davies; Munyonzwe Hamalengwa, assisted by Richard Stern and later by Samuel Willoughby; then Raj Napal, briefly assisted by Suzie Scott.

238 Protecting Mr. Wills' interests did not come cheap. Mr. Wills had spent $70,000 on his own behalf at the outset. Then there was more than $200,000 paid to the two *amicus curiae*. As of November 27, 2007, the Ministry of the Attorney General had paid a grand total of $1,105,063.42 to lawyers acting for Mr. Wills,

not counting Mr. Hamalengwa's outstanding account for $92,038.56.

239 Mr. Wills' publicly funded lawyers were paid as follows:

- Cynthia Wasser, for a total of 305.7 hours plus 85.7 hours by a junior lawyer (Breese Davies) as well as disbursements: **$77,375.00**.
- Munyonzwe Hamalengwa, for an estimated total of 2,704 hours over 17 months, plus disbursements: **$677,604.18**
- Richard Stern, who assisted Mr. Hamalengwa: **$5,130.40**
- Samuel Willoughby, who assisted Mr. Hamalengwa: **$11,564.06**
- Raj Napal, for fees and disbursements: **$317,892.18**
- Suzie Scott, who assisted Mr. Napal: **$15,497.60**

Better Late than Never: The Making of a Protocol

240 While the Wills trial was still ongoing, discussions between the Ministry and Legal Aid Ontario to establish a protocol for Rowbotham and Fisher orders took on renewed relevance. Legal Aid Ontario in particular wanted the Ministry's expectations set out in a new Memorandum of Understanding, and it hoped it would address not only Rowbotham and Fisher orders, but all cases where it was assisting in reviewing legal accounts owed by the Ministry.

241 In the next few months, various draft protocols were prepared. Legal Aid Ontario wanted to use its familiar criteria, and to limit its role to advising how the matter would be handled if it was a Legal Aid Ontario case. It stated from the outset that: "LAO will not attempt to limit the length of a proceeding or control the conduct of the defence."

242 It may be that the Ministry did not enter into these discussions with a sense of urgency at first. Certainly that was Legal Aid Ontario's view. An internal Legal Aid Ontario e-mail of September 4, 2007 recounts that things were proceeding slowly, but "we finally got their attention."

243 What definitely got Ministry attention, in any case, was the avalanche of publicity that occurred two months later. After Mr. Wills was convicted, the media gained access to the funding orders that had been sealed during the trial. True to form, Mr. Wills tried to stop their release, but he had initially waived privilege. His "game playing" was called and then cast aside by Justice Fuerst. A public opinion feeding frenzy had begun. Opposition parties were calling for a review, and I was set to announce my investigation when, on November 5, 2007, newly appointed Attorney General Chris Bentley issued a press release stating that the protocol development, begun immediately after Justice Shaughnessy's June 14, 2007 order, would be accelerated.

244 The minutes of the first Legal Aid/Ministry working group meeting on this subject had made no reference to the Wills case – but tellingly, the next meeting referred to the "Wills case/AG Announcement – Protocol." The tables had turned. While Legal Aid Ontario tried to tinker with the earlier draft it had generated, the Ministry now took the wheel. The draft protocol that followed was no longer a procedure establishing the roles and limits with respect to Legal Aid Ontario in administering court-ordered state funding. It was now a more broadly based policy statement that included a public relations primer on the importance of public funding for unrepresented accused. Of most relevance, it recited a guiding principle that had not before been asserted:

> The *Legal Aid Services Act* provides a comprehensive, legislative code for the assessment and payment of public funds in criminal and civil proceedings.

In the view of the Ministry, Legal Aid Ontario was not on board as a matter of courtesy. It was fulfilling a responsibility and should accept it as such.

245 The response prepared by Legal Aid Ontario was unexpected, opportunistic and discreditable. In spite of its longstanding practice of administering Ministry accounts, and the fact that it had wanted the protocol in the first place, it said in bold print:

> **LAO now believes that since the Act does not provide LAO with the authority to give advice or administer cases that are not eligible for a certificate, that providing advice and financial administration of these cases is not in fact "legal," nor within the mandate of LAO.**

246 The response concludes:

> LAO is a creature of its statute and a change in the legislation would be

required for LAO to be within the mandate of the Act to advise or financially administer cases where the court has ordered that the defence be publicly funded by MAG.

247 Through November and December 2007, Legal Aid Ontario discussed the development of the protocol and Legal Aid Ontario abandoned its untenable technical objection. On December 12, 2007, the Ministry issued a press release announcing that the protocol had been developed. It reads as follows:

> The Ministry of the Attorney General (the "Ministry") and Legal Aid Ontario have a shared duty to promote the public interest through improving the effectiveness of the administration of justice, and ensuring public funds are spent appropriately and prudently. The following principles will help the Ministry and Legal Aid Ontario achieve that shared duty. They are, as always, subject to an order made by a court.
>
> Principles
>
> 1. The Ministry is responsible for the Crown prosecution service and also responsible to the public for funds expended by the Ministry and by Legal Aid Ontario. The Crown prosecution service should act as prosecutor and should not be involved with issues related to the assessment of the accused's financial circumstances performed by Legal Aid Ontario or with payment of accounts by the Ministry. The prosecution service has an important role providing information to Legal Aid Ontario regarding the status and conduct of the proceeding. The Ministry must, however, be able to discharge its role regarding the expenditure of public funds, including necessary financial oversight.
>
> 2. The Legal Aid Services Act, 1998 mandates Legal Aid Ontario to provide legal aid services to low-income Ontarians through assessment and payment of public funds in criminal and civil proceedings.
>
> 3. In the rare circumstances of court-ordered public funding (including Rowbotham or Fisher orders), there should be a consistent approach to ensure that an accused whose liberty is at stake receives support consistent with Legal Aid Ontario's prescribed mandate to fund a "reasonable applicant of modest means."
>
> 4. Publicly funded defence counsel should be paid at the same rate regardless of the source of funding and shall be subject to the required oversight to ensure that public funds are spent appropriately and prudently.

5. The Ministry and Legal Aid Ontario will jointly appear before the court on public funding applications. The Ministry and Legal Aid Ontario recognize that there may be some situations where they may agree that joint appearance is not necessary.

6. Where the court determines that an order should be made, the Ministry and Legal Aid Ontario will, wherever possible, present a joint draft order that will include the following:

   - The Ministry would fund the defence;
   - Legal Aid Ontario would manage the case in accordance with legal aid billing and payment rules and processes;
   - Payment would usually depend on Legal Aid Ontario's assessment of the account according to its rules. However, the Ministry may require that an independent third party with expertise in criminal proceedings review, monitor and assess invoices on an ongoing basis and/or at the conclusion of the proceedings;
   - Where an account is not paid in full, counsel will have access to the review process available through Legal Aid Ontario.

7. The Ministry and Legal Aid Ontario will appear jointly, whenever possible, to seek directions from the court on any necessary variations to, or compliance issues with, public funding orders made by the court.

8. The Ministry and Legal Aid Ontario will work together within their respective authority to recover any costs paid on behalf of an accused.

9. The Ministry and Legal Aid Ontario are committed to ongoing monitoring, review and improvement of this protocol and related policies and procedures.

10. The Ministry and Legal Aid Ontario will consult with the bar as part of their continuing work to strengthen accountability for, and oversight of, public funds.

248 The final product appears to represent a substantial compromise on Legal Aid Ontario's part. It has accepted that administration of Rowbotham and Fisher orders is consistent with its mandate and abandoned the position that it only has an advisory role with respect to such orders. It has acknowledged a shared responsibility for their administration, and that it, like the Ministry, is subject to an order of a court. Had Legal Aid Ontario accepted those principles during the

Wills case, Ontario taxpayers would have been saved a good deal of money.

'Shirked Responsibility' and the Blame Game

249 So where does responsibility lie for this colossal waste? [31] Without question, much of it lies with Mr. Wills. He pushed or drove lawyers away with his personality, causing hundreds of hours of trial preparation to be wasted. His incorrigible antics protracted proceedings, including his insistence on orchestrating his defence, a foolish and unfortunate choice that spawned pointless lines of questioning and consumed days with meritless motions.

250 My concern, however, is not with the man but with the government institutions that came to be involved – the Ministry of the Attorney General and Legal Aid Ontario. Between the two, fault lies squarely with the latter. As Justice Shaughnessy put it, Legal Aid Ontario "shirked the responsibility."

The Ministry Couldn't Have Guessed

251 Some might disagree with my opinion that little, if any, fault lies with the Ministry of the Attorney General, which paid out $604,281.44 in this case before discovering the problem. I have considered this, but I understand why the Ministry did nothing.

252 Ministry officials had come to trust Legal Aid Ontario's established track record. Legal Aid Ontario had often conducted responsible and effective vetting of legal accounts payable by the Ministry and had shown itself in its own practices to be committed to accountability for scarce public justice funds.

253 The Ministry had every reason to believe that Legal Aid Ontario would take its responsibility in the Wills case seriously, given the specific context in which it had become involved. Justice Shaughnessy let it be known that he considered Legal Aid Ontario to be responsible for the very need for a Rowbotham order in the first place. In his view, it was Legal Aid Ontario's inaccurate information about Mr. Wills' wealth, its misaligned priorities in placing his responsibility to

[31] I will not consider whether fault lies with any of the lawyers, as it is not my function. It is unfortunate that this report might taint by simple association even those counsel who acquitted themselves professionally and responsibly. Unfortunately, I cannot identify those who I believe lived up to the finest traditions of the bar without besmirching by exclusion the reputations of those who I fail to name.

fund his own defence ahead of his support obligations, and its decision to impose a condition of repayment that Mr. Wills could not meet, that put the court in a position where it had to act.

254 In the order of June 6, 2006, Legal Aid Ontario had been assigned responsibility to conduct an independent third-party review. While it was Mr. Wills and his counsel who were ordered to bring accounts to Legal Aid Ontario, and not Legal Aid Ontario who was being ordered to act, the judge's order hinged on Legal Aid Ontario conducting the "review of accounts and setting budgets for the defence which meet the needs of accountability in relation to public funds." The order was predicated on Legal Aid Ontario using its Big Case Management program as "a logical tool to address the process of payments of accounts." And the judge had explained that its vetting of accounts should involve "reviewing, adding up, making sure the math is correct" (emphasis added). It was entirely reasonable for the Ministry to assume that Legal Aid Ontario would accept this responsibility, rather than shelter under the legal technicality that it was not a party to the hearing, or that Rowbotham orders are made against the Crown and not Legal Aid Ontario.

255 Given all this, why would the Ministry second-guess Legal Aid Ontario? Most importantly, why would it second-guess Legal Aid Ontario's own unambiguous representations that the job was being done? "We are on notice regarding Mr. Justice Shaughnessy's Order of June 6, 2006 and we are content to comply with it as much as possible," wrote the Big Case Management director in a letter to Mr. Hamalengwa that was copied to all interested parties. Even with that controversial "as much as possible" caveat, Legal Aid Ontario had demonstrated its ability to do this kind of work in the past; it was reasonable to assume that what was "possible," based on past practice, was effective and complete compliance.

256 That letter directed Mr. Hamalengwa to attend a meeting "to set a budget" and described the role of Legal Aid Ontario as "manag[ing] the budgetary process mandated by the order in accordance with our standard practices and procedures" (emphasis added).

257 And this was not the only indication from Legal Aid Ontario that it would honour its role. Even after the Big Case Management director surrendered to Mr. Hamalengwa's objection and decided that he would only check the math and look for clear signs of fraud, his conduct continued to delude the Ministry. His August 21, 2006 letter approving Mr. Hamalengwa's accounts stated:

> We have reviewed the account of details and determined that the account

> is proper as to both fees and disbursements, so we are recommending that you pay him as agreed [emphasis added].

258 Each subsequent approval letter repeated the assurance that the accounts had been determined to be proper, obliquely omitting reference to review of the account details. But this first letter was the most troubling, because it advised, after he had essentially agreed to be no more than a rubber stamp for legal work claimed, no matter how extravagant:

> Please also note that we did meet Mr. Hamalengwa to discuss case management guidelines and budget requirements for the remainder of the case.

259 This was a half-truth. While it was accurate that he and Mr. Hamalengwa had met to discuss case management guidelines and budget requirements, at that meeting Mr. Hamalengwa had actually managed to persuade the Big Case Management director that there should be *no* case management guidelines or budget. Yet the letter implied that management guidelines and budget requirements were underway.

260 Based on those misrepresentations, Ms. Thompson had no reason to infer circumstantially that the Ministry was not getting the straight bill of goods, even as she wrote massive cheque after massive cheque. She had no reason to assume that there was no oversight, having been led to believe that there was a budget.

261 As well, apart from the fact that Legal Aid Ontario was the expert in vetting legal accounts, the central reason why "independent review" of the accounts was needed was the preservation of solicitor-client privilege. It would have been inappropriate for Ms. Thompson to ask for details of how the costs were escalating. As Mr. Campbell explained to our investigators, had the Ministry started to question the bills without provocation, it would have led to serious objection by Mr. Wills' counsel and potentially thrown the trial off the rails. That provocation came only when Legal Aid Ontario's Big Case Management director himself essentially admitted that he saw his role as that of a mere abacus jockey rather than a safeguard against abuse and waste of public funds.

Legal Aid Ontario: 'Not Our Job'

262 Whereas the Ministry's conduct can be understood in the context of a tradition of trust, Legal Aid Ontario's shirking of its responsibility can only be understood, in my view, in the context of the "it's not our job" philosophy that permeated the

institution. Internal e-mails showed the director of Lawyer Services and Payments bellyaching about having the responsibility for the Wills account "foisted" upon the corporation, and lamenting, along with the Big Case Management director, the lack of compensation it received. She told us that she wished the time-consuming job of administering external accounts would be administered by a separate organization.

263 Key members of Legal Aid Ontario seemed fixated on its independence, on payment for work done, and on the technicality that Rowbotham orders are made against the Attorney General and not Legal Aid Ontario, rather than on their public mission of ensuring accountability for public funds. As long as the funds came out of someone else's budget, it was not their concern. They saw themselves as being in the favour business – a "matter of courtesy" – and clearly resented it.

264 The most shocking "not our job" protest was Legal Aid Ontario's attempt during the negotiation of the protocol to claim that it would be *illegal* for it to agree to vet Rowbotham and Fisher orders because of its statutory mandate. This legal interpretation is patently discreditable, and was little more than a contrivance for the corporation to avoid having to deal with matters that did not fit neatly into its computerized system and conventions. What should have been motivating Legal Aid Ontario was public service and a "can-do" attitude.

265 While this is where it started, a contributing factor was Legal Aid Ontario's desire to rely on systems and habits and to avoid responsibility that required imagination and individualized attention. Rowbotham and Fisher orders, we were told, had to be input manually into the computer system. Clearly some within Legal Aid Ontario resented these assignments because they were more taxing.

266 In a memorandum he prepared on June 8, 2007, as news of the Wills funding fiasco was about to break, the Big Case Management director wrote:

> We cannot offer complete LAO Big Case Management on "Fisher order" cases for a number of reasons. Aside from the difference in pay rates [Big Case Management] provides that: case management decisions are made by area directors; disagreement over authorizations mandate a direct appeal to the president; cases expected to cost over $75K go to the [Exceptions Committee]; disbursements are authorized at LAO rates and are decided upon numerous factors peculiar to LAO cases. These are just some major differences....
>
> Because these cases provide no mechanism for recourse if lawyers

> disagree or are unwilling to comply with our processes we remain ineffectual and frustrated.

In other words, the task is unwelcome because it is not an easy fit.

267 This memo is disturbing on several levels. First, it was written over a year after Justice Shaughnessy directed Legal Aid Ontario to use Big Case Management practices *and* after the director wrote to all concerned that this was underway. Now he was describing it as something Legal Aid Ontario could not offer. Second, it ignores the fact that Legal Aid Ontario had been providing this kind of service for years. And third, it shows a regrettable lack of imagination and is bereft of the kind of problem-solving commitment that graces effective public service.

268 Distressingly, this "poor fit" attitude has been offered as an explanation for what occurred in the Wills case, and there is little doubt in my mind that the timing of the June 8, 2007 memo was an attempt at justifying what happened in the Wills case, just as it threatened to become public. Ms. Fairburn told us that while she discussed what had occurred with Legal Aid Ontario officials, the only explanation given was that they were simply not equipped to deal with non-legal-aid cases. They seemed to emphasize the fact that the Exceptions Committee, employed to deal with cases involving amounts greater than $75,000, was a volunteer committee. Legal Aid Ontario did not think it was fair to refer the Wills matter to that committee for consideration, given its volunteer nature.

269 This is completely unpersuasive. The committee was not even asked. Those who volunteer would surely have agreed. And in any case, on June 6, 2006, Legal Aid Ontario veritably undertook to employ its Big Case Management system and had in fact attempted to implement it before Mr. Hamalengwa refused.

270 Mr. Hamalengwa's refusal has been cited as another example of the "poor fit" problem, since the Big Case Management process depends on co-operation with counsel, and Legal Aid Ontario had no mechanism for imposing co-operation on Mr. Hamalengwa. Yet Mr. Hamalengwa was bound by a court order. What better enforcement mechanism for co-operation can there be?

271 It was this "not our job" attitude that provided the fertile ground in which Mr. Hamalengwa's feeble objection to having his accounts vetted managed to take root.

272 Legal Aid Ontario's director of Big Case Management pointed to Mr. Hamalengwa – the fact that he showed only a partial transcript of his exchange

with the judge on "vetting" to the director – to explain why Legal Aid Ontario chose to assume merely a rubber-stamping role. But this "we were duped" excuse is discreditable. Any conscientious reading of any excerpts from the judge's order would demonstrate that more than "adding up the math" was expected. But even leaving that aside, what responsible institution could make what would prove to be a near-million-dollar decision on the strength of an excerpt? What responsible institution, having written to everyone concerned that it was aware of the order, would leave itself blind to what it actually required by acting only on an excerpt? No matter how it is couched or explained, this was nothing short of rank disregard.

273 To make matters worse, the Big Case Management director's memo attempted to pass the buck – to the trial judge, no less:

> (It is of some merit that counsel have managed to remain in a courtroom with this client for the better part of a year and it is unfortunate that Justice Fuerst did not rein in the client by reining in the lawyer. This would have probably led to an "*amicus*" trial but it would have been much shorter and not much less assailable on appeal). Are we in any better position to control this client through his counsel? Without financial or quality control on counsel and keeping in mind our statutory obligation to maintain solicitor client privilege, we are unable to provide a meaningful level of management other than to "make sure the math is correct," to quote Justice Shaughnessy.

274 Justice Fuerst, it should be remembered, was responsible for the conduct of an impartial trial. Of all concerned, she was the last person in a position to make decisions about the resources the defence should be expending. All she could do is what she did do – make decisions after hearing the parties out, and expressing her concern about who was paying for so many frivolous motions, meritless defence strategies and lawyer after lawyer. What's more, Legal Aid Ontario's director of Big Case Management had sent a copy of a letter to her a year earlier, affirming that a budget was being worked out.

275 Most distressing of all, however, this director created correspondence and account endorsements that would lead everyone to believe that things were progressing as they should. Those documents represented that there was budget and oversight in the works at a time when he knew there was not. His explanation? Solicitor-client privilege.

276 There was, in fact, no privilege to violate. How can a discussion between a lawyer who is subject to a vetting order, and the vetting agency, in which the

lawyer claims he should not be vetted, possibly be privileged? How could the order ever be enforced if that is the case? Mr. Hamalengwa was not disclosing confidential information that came to him from this client, nor was he revealing strategies for the case that he had developed for his client. There is a world of difference between the privilege that impedes the Ministry from knowing the budget details that would be imposed on the litigant it is opposing – the reason why third-party review is required – and a discussion about the meaning of a court order relating to the administration of a lawyer's account, between the lawyer and the putative account administrator. It is worrisome that the Big Case Management director would not understand that. It is truly staggering that he did not bother to get legal advice to make sure.

277 In any case, none of this explains how he could have sent the letter of August 21, 2006 that would cause any reasonable reader to assume that a budget was in the works, when the truth was the exact opposite.

278 Finally, how is it that his failed administration never percolated to the top? It is not as if this file was not a special concern to Legal Aid Ontario. There had been court appearances by its lawyers, and memos and correspondence with the Ministry. Yet his superior, the director of Lawyer Services and Payments, told us that up until May 31, 2007, she had been under the impression the accounts submitted in connection with the Wills defence were being reviewed in accordance with the Big Case Management program, although she indicated that she knew at some point no budget had been set. She explained that it was around the time of his letter to Mr. Napal that she realized what had been happening. She recalled the Big Case Management director showing her the partial transcript from the June 6, 2006 hearing and explaining to her that Legal Aid Ontario was only responsible for checking the math.

279 There is a discrepancy between their versions of events; the Big Case Management director says he kept his superior informed, and he was not instructed by her to advise the Ministry of the decision to jettison the budget process in favour of merely "adding up the math."

280 I am not in a position to make a factual finding as to who has it right. But I will say that even if the Lawyer Services and Payments director did not learn until May 2007 that Legal Aid Ontario had been shirking its responsibility, that failure to know would mark a failure of management and oversight. Legal Aid Ontario was so intent on protecting its own budget that its president received appeals and notice of Big Case Management budgets, but in Ministry money cases no one from upper management even bothered to check on the file? If that is what happened, it is yet another indication of just how lightly Legal Aid Ontario took

its responsibility to assist the Ministry in protecting the public purse.

A Change of Guard

281 The problems in Legal Aid Ontario that enabled the Wills funding fiasco have not gone unnoticed by its new administration. In July 2007, John McCamus was appointed Chair of the Board of Directors, and in the fall of 2006, Robert Ward came on board as the new President and Chief Executive Officer. Under their leadership, Legal Aid Ontario is working to improve its role in the administration of Ministry accounts.

282 Mr. Ward told us he recognized that as a public corporation dedicated to accountability for public funds, it is appropriate for Legal Aid Ontario to assist the Ministry in monitoring legal accounts. He also saw the need to improve Legal Aid Ontario's accountability structure. As part of the corporate evolution, controls have now been established with respect to court-ordered legal assistance cases. A new manager is being hired who will be directly responsible for dealing with these accounts. In the future when Rowbotham and Fisher orders are received for administration, Mr. Ward must be notified, as well as corporate counsel. These matters are no longer seen as the domain of middle management. Finally, he recognized the need to put systems in place where staff can seek clarification from their superiors and those they work with, such as the Ministry.

283 Importantly, Legal Aid Ontario is not disregarding the past in building for the future. Its board of directors, through its Audit and Finance Committee, is currently conducting a review of the Wills accounts and is probing the circumstances leading to the failure to review them appropriately. Legal Aid Ontario appears to be headed in the right direction.

Next Steps

Staying on Track: Recommendations 1 and 2

284 The reaction of Legal Aid Ontario's new administration to the Wills fiasco is commendable, but the structural changes are still in the embryonic stage. It is important that they be monitored so that if they falter it becomes known in time to correct. I am therefore recommending that Legal Aid Ontario keep me apprised at six-month intervals of the progress that is being made in this area, supported by precise information about how many cases it has administered, the types of cases administered, the processes used in their administration, the amounts recommended for payment, and the form of supervisory review that has occurred (**Recommendation 1**).

285 I am recommending that Legal Aid Ontario share the results of its audit relating to the Wills case with the Ministry and with my Office. (**Recommendation 2**). While I understand there may be some information subject to solicitor-client privilege, I believe that the corporation should be able to report in adequate detail on the results of its findings without disclosing privileged information.

Value for Money: Recommendation 3

286 There is real reason to be concerned over whether the public received value for money in funding Richard Wills' defence – not only the $1,105,063.42 that has already been paid but also the more than $92,000 that Mr. Hamalengwa is still seeking. Both the trial judge and an *amicus curiae* have cast doubt on whether the public has been well served in this case, even leaving aside the monies wasted on preparation for lawyers who were fired by Mr. Wills. There is reason to believe that Mr. Wills made many of the tactical decisions, not his counsel. Whether or not that is true, much of the work appears to have been wasteful. Mr. Schreck, who replaced Mr. Borenstein as *amicus curiae* during the trial, told us:

> A lot of time was spent on pretrial applications and mid-trial applications that in my view were frivolous, that no experienced defence lawyer would have brought or would have spent time on. And in that sense, I think that is a waste of public funds.

287 While I commend Legal Aid Ontario's board of directors for reviewing the accounts, and while their expertise is appreciated, Legal Aid Ontario is too conflicted to clear the public air. Without in any way suggesting that it would influence the evaluation, the corporation does have an interest in minimizing the

damage done. From the point of view of appearances alone, public confidence in the administration of justice would best be served by an independent evaluation.

288 Ideally, the accounts could be fully taxed by the Assessment Officer of the Superior Court of Justice for Ontario, since the Assessment Officer can disallow inappropriate charges which can then be recovered from counsel. In this way, it may be possible to recoup any unwarranted expenditures from the lawyers involved. In making this recommendation, I do not cast aspersions on the honesty or integrity of any of the lawyers; taxation includes an evaluation of the reasonableness of the account given the nature of the retainer. Public confidence in the administration of justice requires that best efforts be taken to ensure value for money. I am therefore recommending that the Ministry take all available steps to achieve a judicial taxing of the defence accounts it paid in the Wills matter (with the exception of the Wasser accounts)[32] and that if it forms the opinion that this is not legally feasible, it share that opinion with my Office so it can be evaluated (**Recommendation 3**).

Following the Money: Recommendations 7 and 4

289 The bone that remains in the throat after everything else in this case has been swallowed is that, whatever his motivation, Richard Wills purposely disposed of significant assets before he asked to be defended at the public's expense. This has caused considerable indignation.

290 I agree with Justice Shaughnessy, however, that the Legal Aid Ontario practice of denying funding or predicating it on impossible conditions when this kind of thing occurs is no solution. The reality is that when an accused person does not have the means to fund his defence, regardless of how that condition occurred, the accused may still need the public's help to defend himself. The solution when such an accused has created his own poverty is not to deny him funding and risk an unfair trial by sending him into court unrepresented; it is to recoup the money he has transferred away.

291 The law in Ontario provides relief in certain circumstances where an individual has conveyed property with the intent to defeat, hinder, delay or defraud. Creditors can attempt to impeach such transactions under the *Assignments and Preferences Act*, if a debtor has disposed of property to a creditor, was insolvent

[32] It should not be necessary to tax the Wasser accounts because her services, and those of her co-counsel, were premised on an initial review approved by the Court before Legal Aid Ontario implemented Justice Shaughnessy's order of June 6, 2006.

or on the eve of insolvency, and intended to prefer one creditor over another or if the disposition had the effect of preferring a creditor. Under the *Fraudulent Conveyances Act*, the court can determine that such transactions are void, provided the transfer was not made to someone acting in good faith for valuable consideration. To succeed under that Act, a creditor or "other" person must show that the debtor disposed of the property for nominal consideration with the intent to defeat creditors.

292 It may well be that these statutory mechanisms are unavailable where, like Mr. Wills, those charged with offences hive off their assets *before* they apply for legal aid. There is case law suggesting that in the case of the *Fraudulent Conveyances Act*, creditors or "others" must exist at the time the transfers were made,[33] and Legal Aid Ontario was not a creditor of his when Mr. Wills passed off his assets. The courts have also granted some leeway for individuals to reorder their affairs to isolate personal assets from future, as opposed to present, liabilities.[34]

293 Applications for legal aid, however, are clearly different form the ordinary debtor-creditor cases. In the ordinary debtor-creditor case, there are market forces that can inhibit discarding assets before debt is incurred; a creditor can always refuse to extend credit if the debtor has just judgment-proofed himself in anticipation of the contract. Debtor-creditor relationships are entered voluntarily between two parties, whereas legal aid funding is furnished according to statutory criteria where there is eligibility, and it is provided not only in the personal interests of the applicant but in the public interest in ensuring fair trials. As a result, by playing brinksmanship, criminal accused can make themselves dependent on the state before applying for legal aid, knowing that the state cannot fulfill its own obligation to conduct a fair trial without providing the funding. Any policy reasons for limiting the *Assignment and Preferences Act* or the *Fraudulent Conveyances Act* to existing credit arrangements do not apply in the case of legal aid applications.

294 I am therefore recommending that the Government introduce a statutory provision that would allow Legal Aid Ontario and the Crown to apply to court for a determination of whether an individual's transfer of assets was deliberately for the purpose of rendering him eligible for state-funded legal assistance. (**Recommendation 7**). There could even be a rebuttable presumption that such a transfer is undertaken with this intent if it is done after a criminal charge has been

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[33] *Bank of Nova Scotia v. Holland*, [1979] O.J. No. 1190, (Ont.H.C.J.).

[34] *Genereux v. Carlstrom*, [2002] O.J. No. 1841, (Ont. Sup. Ct.), [2003] O.J. No. 356, (O.C.A.), but see *Ottawa Wine Vaults Co. v. McGuire* (1912) , D.L.R.229 (O.C.A.), aff. 13 D.L.R. 81 (S.C.C.), where it was stated that a voluntary conveyance made with intent to affect future creditors alone is within the statute and will be set aside.

laid, or when there is a reasonable prospect of a criminal charge being laid. The court would have the authority to void such transactions, or alternatively, find a transferee liable to disgorge the proceeds of any further transfer of the property to a party acting in good faith. The court would also be authorized to consider any other creditor interests, including support obligations, in determining how to proceed.

295 Another legislative amendment the Government might wish to consider is to make it a provincial offence to dispose of assets and knowingly receive assets for no or inadequate consideration in circumstances where the transferor intends to apply for legal aid.

296 As for Mr. Wills, he clearly intended to render himself a pauper before applying for Legal Aid Ontario. Even if his motive was to help his family, he was well aware that he was disposing of property needed in his criminal defence and that by doing so he would have to rely on the public purse. It is clear that after he wasted his first $70,000 in legal fees by firing his lawyers, he was not going to contribute anything more to his legal fees, even though at that time he had the means to do so. This attitude is evident in the question he asked Justice Kenkel – whether he would have to repay the money if the court appointed a lawyer for him. It is clear in his decision, while a legal aid application was pending, to give the $10,000 in refunded retainer monies to his estranged wife, who had already received far more than she ever would have in a separation agreement. His act of assigning his entire pension – his sole means of funds -- was a decision no person would make out of a sense of obligation to others. His subsequent transactions together bore the so-called "indicia of fraud" looked for in bankruptcy cases: They occurred between near relatives, they eliminated virtually all of his property and they took place in a relatively short period of time.

297 Mr. Wills clearly denuded himself of assets so he could get free public funding for his defence, which is intolerable. The Ministry must not allow this to go unchallenged. Mindful that this pursuit may hit a dead end, I am nonetheless recommending that the Ministry investigate all opportunities to recoup monies expended on Mr. Wills' defence (**Recommendation 4**).

Making it Legal: Recommendation 6

298 The protocol that has been negotiated between the Ministry of the Attorney General and Legal Aid Ontario is an attractive document, but it is only a protocol. It is an internal policy document that does not bind prosecutors, defence lawyers or judges. Moreover, protocols too often sit gathering dust on government shelves, serving as nothing more than past aspirations forged in response to

forgotten events. I am therefore recommending a legislative solution. I recognize that the Wills case is an exceptional one, an aberration that resulted from a perfect storm of mischief and misjudgment, and that it is often ill-advised to create laws to deal with perverse exceptions. That is not the case here. The Wills fiasco has red-flagged a number of systemic problems that only legislation can effectively correct.

299 First, Legal Aid Ontario was confused about its legal role and resisted its responsibility over Ministry of the Attorney General accounts, even suggesting at one point that the law prevented it from assisting in such cases. Legislation can remove the confusion by asserting with undeniable authority that the *Legal Aid Services Act, 1998* is the one-stop shopping venue for the administration of public justice funds.

300 Second, the current law failed to provide clarity about the relative roles of the Ministry and Legal Aid Ontario. Confusion over what administration entails and what role privilege plays fed the funding furnace that burned through so many public dollars. Legislation can cure these kinds of problems by setting out appropriate administrative criteria.

301 Third, there is no set administrative framework for overseeing the diverse kinds of funding orders for legal fees that exist. Legislation can provide the mechanism not only for Rowbotham and Fisher orders but for everything covered by the *Proceedings Against the Crown Act,* including Ontario Review Board funding, funding for criminal appeals imposed by *Criminal Code* orders, third-party record applications, or orders funding counsel to cross-examine children in sexual assault cases.

302 It can even provide for the review of the funding of *amicus curiae*. The two assigned by judges in the Wills case together billed over $200,000. Yet as Mr. Schreck told us, "nobody was overseeing [us] in terms of double-checking whether [we] were wasting money, there was no mechanism in place for that." These accounts have at times been paid through Court Services as opposed to the Ministry or Legal Aid Ontario budgets, as happened in the Wills case. The hodgepodge approach to budget attribution is not sensible.

303 Judges are not bound by the Ministry/Legal Aid Ontario Protocol. They are bound by legislation. Providing a clear statutory administrative scheme will give guidance, content and uniformity for all relevant orders.

304 Such legislation could and should also include a mechanism for discouraging the kind of waste that occurred in the Wills case as a result of his firing lawyer after

lawyer. I understand that no absolute prohibitions can be put in place to prevent clients from firing their lawyers, even when public money is at stake – there are occasions where, for legitimate reasons, the frame of trust is broken. Mr.Wills, however, fired lawyers as a stalling tactic, or because they would not follow his direction to present the case that he wanted, regardless of their advice or principles, and regardless of how fruitless or wasteful his directions might be. There is no perfect control for this kind of abuse but, in my opinion, it is most likely to be discouraged if changes of state-funded counsel require judicial approval. Legal Aid Ontario should have standing to participate when such matters are heard by a judge.

305 I understand that there may be privilege issues and *Charter* considerations, but judges making these decisions can evaluate the explanations they are offered in the context of the case, and can account for constitutional rights as required on the facts before them. Having no real controls is unacceptable.

306 I am therefore recommending that the *Legal Aid Services Act, 1998* be amended to impose a clear statutory duty on Legal Aid Ontario to administer the use of any provincial funds for the payment of legal fees, and to establish criteria for the quantum and assessment of such fees (**Recommendation 6**).

The 'Elephant in the Room'

307 It is not my function to pass judgment on the adequacy of legal aid tariffs in this province. The issue is currently being examined by Professor Michael Trebilcock, of the University of Toronto. This report should, however, give Professor Trebilcock support should he ultimately recommend an increase in the tariff. The Wills case provides a clear example of a reputable senior lawyer refusing to work for legal aid rates, and making an impassioned and cogent protest against doing so. My investigation also shows that paying non-competitive rates can prove to be false economy; if a court has to make a Fisher order or appoint *amicus curiae*, it will cost more in the end. Moreover, reliance on Fisher orders, even in exceptional cases, accepts a two-tiered system in which some receive greater public funding for their lawyers than others. It is hard to justify that. These are things that I am certain will not be lost on Professor Trebilcock when he reports to the Government.

Opinion

308 It is my opinion, in accordance with s. 21(1)(b) and (d) of the *Ombudsman Act*, that Legal Aid Ontario's failure to adequately administer the funding arrangement in connection with the state-funded defence of Richard Wills was unreasonable and wrong.

Recommendations

309 In order to address the deficiencies revealed during my investigation into Legal Aid Ontario's role in funding of the criminal defence of Richard Wills, I make the following recommendations:

Legal Aid Ontario

Recommendation 1

310 I recommend that Legal Aid Ontario report back to my Office at six-month intervals regarding its progress in implementing changes to its practices concerning administering non-certificate accounts on behalf of the Ministry of the Attorney General, including providing information about the number and types of cases administered, the processes used in their administration, the amounts recommended for payment, and the form of supervisory review that has occurred, until such time as I am satisfied that it is properly administering non-certificate matters.

Subsection 21(3)(g) *Ombudsman Act*

Recommendation 2

311 I recommend that Legal Aid Ontario share with my Office and the Ministry of the Attorney General the results of its audit relating to the Wills case, and that it inform my Office of any steps that it intends to take to remedy concerns it has identified, including any proposed changes to its internal processes and policies. I recommend Legal Aid Ontario provide my Office with update reports at six-

month intervals on the progress Legal Aid Ontario has made with respect to implementing any such changes, until I am satisfied that any concerns have been adequately addressed.

Subsection 21(3)(g) *Ombudsman Act*

The Ministry of the Attorney General

Recommendation 3

312 I recommend that the Ministry of the Attorney General take whatever steps are necessary to attempt to have the defence accounts rendered in the Wills case assessed by the Assessment Office of the Superior Court of Justice for Ontario, or by another judicial officer. This would apply to accounts for the period, commencing after Ms. Wasser was dismissed as counsel until June 14, 2007, when Legal Aid Ontario began scrutinizing the accounts. Should the Ministry decide that no steps are feasible, the opinion relied on to support that conclusion should be shared with me.

Subsection 21(3)(g) *Ombudsman Act*

Recommendation 4

313 I recommend that the Ministry investigate all opportunities to recoup any monies expended on Mr. Wills' defence, using any available legal remedies, and take any available action to recover these amounts.

Subsection 21(3)(g) *Ombudsman Act*

Recommendation 5

314 I recommend that the Ministry report back to me at six-month intervals regarding the progress it has made in having legal accounts in this matter assessed and in attempting to recoup any monies expended on Mr. Wills' defence, until such time as I am satisfied that adequate steps have been taken to address this matter.

Subsection 21(3)(g) *Ombudsman Act*

The Government of Ontario

Recommendation 6

315 I recommend that the Government of Ontario establish a legislative scheme for administration of court orders for provincially funded defence counsel. The legislation should provide:

- That all court orders requiring that counsel be appointed for an accused at the expense of the province shall be administered through Legal Aid Ontario;
- That unless otherwise ordered, defence counsel providing services under an order requiring funding by the province shall be paid at Legal Aid Ontario tariff rates and administered consistent with Legal Aid Ontario policies and procedures;
- That counsel so appointed will be bound by Legal Aid Ontario determinations regarding their accounts, and will be entitled to utilize Legal Aid Ontario's existing internal appeals processes;
- That counsel under the court order cannot be changed without approval of the court; and
- That, unless otherwise ordered, rates of remuneration for *amicus curiae* will be at Legal Aid Ontario tariff rates and administered consistent with Legal Aid policies and procedures.

Subsection 21(3)(g) *Ombudsman Act*

Recommendation 7

316 I recommend that the Government of Ontario introduce a statutory provision that would allow Legal Aid Ontario and the Crown to apply to court for a determination of whether a transfer of assets has been deliberately made without proper consideration for the purpose of rendering an individual eligible for state-funded legal assistance, and give the court the authority to declare a transaction void, as well as the authority to require that the transferee pay over any proceeds from a further sale of the asset to Legal Aid Ontario or the Government of Ontario, as the case may be.

Subsection 21(3)(g) *Ombudsman Act*

Recommendation 8

317 I recommend that the Government of Ontario report back to my Office at six-month intervals regarding the progress it has made with respect to introducing legislative changes to create a statutory scheme for administration of court orders for provincially funded defence counsel and for dealing with individuals who have deliberately disposed of assets to qualify for state-funded defence counsel, until such time as I am satisfied that the concerns raised by the Wills case have been addressed.

Subsection 21(3)(g) *Ombudsman Act*

Responses

318 At the conclusion of my investigation, a preliminary report and recommendations were provided to Legal Aid Ontario, the Ministry of the Attorney General, and the Attorney General for review and comment. The President and Chief Executive Officer responded on behalf of Legal Aid Ontario and the Deputy Attorney General responded on behalf of the Ministry and the Attorney General.

319 In its February 8, 2008 response, Legal Aid Ontario fully acknowledged its accountability with respect to its failure to properly administer the accounts relating to the Wills matter. It also accepted my recommendations without reservation. In doing so, it made the following comments:

> LAO agrees with the report's central conclusion that the Wills matter was poorly handled by LAO, that the accounts of defence counsel were not properly scrutinized by LAO prior to the Court's order of June 14, 2007 and that there was a serious lack of proper management oversight.
>
> As you stated in your report, LAO's review of accounts on behalf of the Ministry had been rigorous and responsible prior to the Wills case. You also noted that LAO had applied itself diligently to the review of the Wills accounts following the Court's order of June 14, 2007. On behalf of LAO, I express LAO's deep regret that the same rigour and accountability were not applied in LAO's handling of the Wills case prior to the Court's order. Your report details the many unusual and challenging features of this case but they do not excuse the failure of administrative effectiveness that

occurred in this instance.

320 Legal Aid Ontario also undertook to improve its administration of defence counsel accounts in future court-ordered counsel cases. In addition to entering into the protocol with the Ministry, it advised that it is taking the following constructive steps:

- It is continuing to work with the Ministry to develop supporting procedures and guidelines to ensure efficient and effective administration of these cases, including an enhanced proactive monitoring function during proceedings;
- It has implemented changes in the administration of non-certificate cases at LAO by creating a new unit and hiring a manager to oversee these cases. The Manager reports directly to the Vice-President;
- It has increased senior management oversight of all cases costing more than $75,000 by requiring financial sign-off by senior management;
- It is conducting a review of all criminal "big case" policies and practices and reviewing what additional measures are required in order to achieve greater accountability for those cases. It will consult with the bar and Ministry of the Attorney General about appropriate levels of management oversight and analysis of the different categories of big cases;
- It will share the results of its board of directors' internal review of LAO's handling of the Wills case with my Office and the Ministry. Consistent with my recommendation, the board will also recommend to the Ministry that the accounts of defence counsel in the Wills case be assessed, if possible, through the normal court-administered taxing process.

321 Legal Aid Ontario welcomed my recommendations, and committed to keep me informed of its progress in the management of big cases. In closing, Legal Aid Ontario demonstrated a willingness to improve and better serve the interests of the public of Ontario. The President and CEO remarked:

> LAO agrees with you that it is important not to disregard the past in building for the future. LAO has learned from its experience in the Wills case and LAO is committed to ensuring that its present and future management of the accounts of big criminal cases, including non-certificate cases, be rigorous and responsible in keeping with its statutory mandate to provide consistently high quality legal aid services in a cost-

effective and efficient manner to low-income individuals throughout Ontario and in keeping with its agenda to provide value to the taxpayers of Ontario.

322 I was impressed by Legal Aid Ontario's candour, and its willingness to accept responsibility for its maladministration and move swiftly to remedy the systemic issues uncovered as a result of my investigation. However, on the same day I received this model response on behalf of LAO, I was disappointed to receive a substantially less constructive missive from the Ministry of the Attorney General.

323 Rather than respond with concrete information about the steps it intends to take towards implementation of the recommendations I addressed to the Ministry and the Government, the Deputy Attorney General's response struck a rather superficial chord. It was in large measure a statement of *intent to respond* at some future as yet undetermined date. I was advised:

> We fully intend to respond to the recommendations directed to the Ministry and the government and I'm pleased to outline some of the steps that have already been taken.

324 The Ministry spent considerable time explaining what it intended to do to further the protocol that it had developed with LAO, and how it intended to work with LAO to ensure improvement in Big Case Management. However, its response to my specific recommendations was glaringly sparse. It stated:

> With respect to your recommendations to the Ministry and the government regarding:
>
> - a possible independent assessment of the defence accounts in the Wills case (Rec 3)
> - the potential to recover public funds (Rec 4)
> - the codification of the protocol in legislation (Rec 6)
> - legislation that would limit the ability of a person to divest themselves of assets in order to become eligible for state-funded legal assistance (Rec 7)
>
> I can advise you that these matters have all been under active consideration by the Ministry for some time. We are grateful to have your views and opinions in these important areas and as recommended, we will report back to you on our decisions (Recs 5 and 8) ....
>
> We also acknowledge and appreciate other ideas and suggestions in your

> draft report that, although not forming part of your formal recommendations, will also be considered ....
>
> In closing, I wish to assure you that the Ministry is confident that the processes now in place will provide the effective oversight the public expects with respect to the expenditure of public funds. More improvements and refinements will be made, and we will report back to you as we continue to move forward with LAO.

325 Reading the Ministry's response, I was left with the distinct impression that I was being given the proverbial brush-off. While the Ministry did indicate that it intended to seek an assessment of the legal accounts and attempt recovery of the public funds expended on Mr. Wills' defence, it gave no indication whatsoever of whether it planned to implement my recommendations for legislative change. To the contrary, the Ministry appears to be quite content with "the processes now in place."

326 I do not share the Ministry's confidence in its new protocol with Legal Aid Ontario as a solution to the systemic concerns underscored by the Wills case. I urge the Ministry and the Government to seriously consider the comprehensive scheme for addressing court-ordered funding of counsel that I have recommended, and to introduce a legislative process for recovery of funds in circumstances where it appears the legal aid system has been abused. I am concerned that there is no sense of urgency or necessity on the Ministry's part regarding these recommendations. Rather than substantive information on next steps, the Ministry has left me with only vague references to decisions to be made at some point in the future.

327 The Ministry has committed to report back to me in six months on its progress in implementing my recommendations. At that time, I will assess whether it has taken any tangible steps towards the improvements I believe are necessary to ensure a comprehensive and accountable system for administering court-ordered funding of counsel and dealing with legal aid abuse in this province.

André Marin
Ombudsman of Ontario

A TEST OF WILLS

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